1

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 933.

CORNELL STEAMBOAT COMPANY, PLAINTIFF IN ERROR,

vs.

PHŒNIX CONSTRUCTION COMPANY.

No. 934.

CORNELL STEAMBOAT COMPANY, PLAINTIFF IN ERROR,

vs.

PHŒNIX CONSTRUCTION COMPANY.

No. 935.

CORNELL STEAMBOAT COMPANY, PLAINTIFF IN ERROR,

vs.

PHŒNIX CONSTRUCTION COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED MARCH 9, 1914.

(24,084, 24,085, and 24,086)

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a Action No. 1.

COURT OF APPEALS,
State of New York, ss:

Pleas in the Court of Appeals held in the Capitol in the City of Albany on the 30th day of December in the year of our Lord one thousand nine hundred and thirteen before the Judges of the said Court.

Witness the Honorable Edgar M. Cullen, Chief Judge presiding.

R. M. BARBER, *Clerk.*

Remittitur December 31, 1913.

b Action No. 1.

PHOENIX CONSTRUCTION COMPANY, Respondent,
against
CORNELL STEAMBOAT COMPANY, Appellant.

Be it remembered that on the 31st day of January, in the year of our Lord one thousand nine hundred and twelve Cornell Steamboat Company, the appellant in this action, came here into the Court of Appeals, by Amos Van Etten, its attorney, to file in the said Court, a notice of appeal and return thereto from the judgment and order of the Appellate Division of the Supreme Court in and for the First Judicial Department and the Phoenix Construction Company, the respondent in said action, afterwards appeared in said Court of Appeals by E. Crosby Kindleberger, its attorney.

Which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon the said Court of Appeals having heard this cause argued by Mr. J. Parker Kirlin of Counsel for the appellant and by Mr. E. Crosby Kindleberger of Counsel for the respondent, and after due deliberation had thereon, did order and adjudge
c that this judgment of the Appellate Division of the Supreme Court appealed from in this action be in all things affirmed, and it was further ordered and adjudged that the respondent recover against the appellant costs of appeal to this Court.

And it was also further ordered that the record aforesaid and the proceedings of this Court be remitted to the said Supreme Court there to be proceeded upon according to law.

Therefore it is considered that the said judgment be in all things affirmed with costs as aforesaid and stand in full force, strength and effect.

And hereupon as well as the notice of appeal and return thereto aforesaid as judgment of the Court of Appeals aforesaid by them given in the premises are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof according to the form of the statute in such case made and

provided to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, etc.

R. M. BARBER,
Clerk of the Court of Appeals
for the State of New York.

d COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *December* 31, 1913.

I hereby certify that the preceding record contains a correct transcrip of the proceedings in said action in the Court of Appeals with the papers originally filed therein attached thereto.

[SEAL.] R. M. BARBER, *Clerk.*

e Action No. 2.

COURT OF APPEALS,
State of New York, ss:

Pleas in the Court of Appeals held in the Capitol in the City of Albany on the 30th day of December in the year of our Lord one thousand nine hundred and thirteen before the Judges of the said Court.

Witness the Honorable Edgar M. Cullen, Chief Judge presiding.

R. M. BARBER, *Clerk.*

Remittitur December 31, 1913.

f Action No. 2.

PHOENIX CONSTRUCTION COMPANY, Respondent,
against
CORNELL STEAMBOAT COMPANY, Appellant.

Be it remembered that on the 31st day of January, in the year of our Lord one thousand nine hundred and twelve Cornell Steamboat Company, the appellant in this action, came here into the Court of Appeals, by Amos Van Etten, its attorney, to file in the said Court, a notice of appeal and return thereto from the judgment and order of the Appellate Division of the Supreme Court in and for the First Judicial Department and the Phoenix Construction Company, the respondent in said action, afterwards appeared in said Court of Appeals by E. Crosby Kindleberger, its attorney.

Which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon the said Court of Appeals having heard this cause argued by Mr. J. Parker Kirlin of Counsel for the appellant and by Mr. E. Crosby Kindleberger of Counsel for the respondent, and after due deliberation had thereon, did order and adjudge
g that the judgment of the Appellate Division of the Supreme Court appealed from in this action be in all things affirmed, and it was further ordered and adjudged that the respondent recover against the appellant costs of appeal to this Court.

And it was also further ordered that the record aforesaid and the proceedings of this Court be remitted to the said Supreme Court there to be proceeded upon according to law.

Therefore it is considered that the said judgment be in all things affirmed with costs as aforesaid and stand in full force, strength and effect.

And hereupon as well as the notice of appeal and return thereto aforesaid as judgment of the Court of Appeals aforesaid by them given in the premises are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof according to the form of the statute in such case made and provided to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, etc.

R. M. BARBER,
Clerk of the Court of Appeals
for the State of New York.

h

COURT OF APPEALS, CLERK'S OFFICE.
ALBANY, *December* 31, 1913.

I hereby certify that the preceding record contains a correct transcrip of the proceedings in said action in the Court of Appeals with the papers originally filed therein attached thereto.

[SEAL.] R. M. BARBER, *Clerk.*

i

Action No. 3.

COURT OF APPEALS,
State of New York, ss:

Pleas in the Court of Appeals held in the Capitol in the City of Albany on the 30th day of December in the year of our Lord one thousand nine hundred and thirteen before the Judges of the said Court.

Witness the Honorable Edgar M. Cullen, Chief Judge presiding.

R. M. BARBER, *Clerk.*

Remittitur December 31, 1913.

j

Action No. 3.

PHOENIX CONSTRUCTION COMPANY, Respondent,
against
CORNELL STEAMBOAT COMPANY, Appellant.

Be it remembered that on the 31st day of January, in the year of our Lord one thousand nine hundred and twelve Cornell Steamboat Company, the appellant in this action, came here into the Court of Appeals, by Amos Van Etten, its attorney, to file in the said Court, a notice of appeal and return thereto from the judgment and order of the Appellate Division of the Supreme Court in and for the First Judicial Department and the Phoenix Construction Company, the respondent in said action, afterwards appeared in said Court of Appeals by E. Crosby Kindleberger, its attorney.

Which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed.

Whereupon the said Court of Appeals having heard this cause argued by Mr. J. Parker Kirlin of Counsel for the appellant and by Mr. E. Crosby Kindleberger of Counsel for the respondent, and after due deliberation had thereon, did order and adjudge
k that the judgment of the Appellate Division of the Supreme Court appealed from in this action be in all things affirmed, and it was further ordered and adjudged that the respondent recover against the appellant costs of appeal to this Court.

And it was also further ordered that the record aforesaid and the proceedings of this Court be remitted to the said Supreme Court there to be proceeded upon according to law.

Therefore it is considered that the said judgment be in all things affirmed with costs as aforesaid and stand in full force, strength and effect.

And hereupon as well as the notice of appeal and return thereto aforesaid as judgment of the Court of Appeals aforesaid by them given in the premises are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof according to the form of the statute in such case made and provided to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, etc.

R. M. BARBER,
Clerk of the Court of Appeals
for the State of New York.

l COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *December* 31, 1913.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals with the papers originally filed therein attached thereto.

[SEAL.] R. M. BARBER, *Clerk.*

m In the Court of Appeals of the State of New York.

Action No. 1.

PHOENIX CONSTRUCTION COMPANY, Plaintiff-Respondent,
vs.
CORNELL STEAMBOAT COMPANY, Defendant-Appellant.

Action No. 2.

PHOENIX CONSTRUCTION COMPANY, Plaintiff-Respondent,
vs.
CORNELL STEAMBOAT COMPANY, Defendant-Appellant.

Action No. 3.

PHOENIX CONSTRUCTION COMPANY, Plaintiff-Respondent,
vs.
CORNELL STEAMBOAT COMPANY, Defendant-Appellant.

Cases on Appeal.

E. Crosby Kindleberger, Attorney for Plaintiff-Respondent, 2 Rector Street, New York City.
Amos Van Etten, Attorney for Defendant-Appellant, 22 Ferry Street, Kingston, N. Y.

1 In the Appellate Division of the Supreme Court on the State of New York, First Judicial Department.

Action No. I.

THE PHOENIX CONSTRUCTION COMPANY, Plaintiff-Respondent,
vs.
CORNELL STEAMBOAT COMPANY, Defendant-Appellant.

Action No. II.

THE PHOENIX CONSTRUCTION COMPANY, Plaintiff-Respondent and Appellant,
vs.
CORNELL STEAMBOAT COMPANY, Defendant-Appellant and Respondent.

Action No. III.

THE PHOENIX CONSTRUCTION COMPANY, Plaintiff-Respondent,
vs.
CORNELL STEAMBOAT COMPANY, Defendant-Appellant.

Statement.

2 The above entitled actions were commenced by the service of a summons and complaint on the defendant on the 17th day of May, 1909. The defendant appeared in each of

said actions and served an answer therein to the complaint on the 26th day of June, 1909. On October 2, 1909, by an order duly entered in the office of the clerk of the County of New York, Hon. Charles F. Brown was appointed Referee in each of said actions to hear and determine the same. The actions were brought on for hearing before the Referee at his office in the City of New York on the 15th day of November, 1909, and thereafter continued from time to time and were finally submitted to the Referee on the 23d day of May, 1910. The Referee's decision is dated the 15th of August, 1910. An opinion was filed by the Referee in which he finds for the plaintiff in all three actions, although not sustaining the claim of the plaintiff in full in Action No. II. Judgment was entered on the 6th day of September, 1910, in the office of the clerk of the county of New York, and from the judgment entered in each action, and the order granting an extra allowance in Action No. III separate appeals were taken. The plaintiff has also appealed in Action No. II. Each of the above entitled actions were tried separately, although a large part of the evidence introduced in Action No. I was applicable to all three actions, and it was stipulated that so much thereof as was applicable to Actions No. II and No. III, should be deemed a part thereof. For that reason one appeal book is made instead of three separate books.

There has been no change in the attorneys or the parties to any of said actions.

3 *Notice of Appeal.*

Supreme Court, New York County.

Action No. 1.

THE PHOENIX CONSTRUCTION COMPANY, Plaintiff,
vs.
CORNELL STEAMBOAT COMPANY, Defendant.

SIRS: You will please take notice that the defendant herein, the Cornell Steamboat Company, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, First Department, from a judgment made in this action and entered in the office of the Clerk of the County of New York on the 6th day of September, 1910, which judgment determines that the plaintiff recover from the defendant the sum of four thousand One Hundred forty-six and 58/100 dollars, ($4,146.58), being the amount of damages, interest and costs, and prays that said judgment may be in all things reversed and set aside.

Dated, September 24th, 1910.

Yours, etc.,

AMOS VAN ETTEN,
Attorney for Defendant-Appellant,
22 Ferry Street, Kingston, N. Y.

To E. Crosby Kindleberger, Esq., Attorney for Plaintiff; William F. Schneider, Esq., County Clerk of New York County.

4 *Summons.*

Trial desired in New York County.

Action No. 1.

THE PHOENIX CONSTRUCTION COMPANY, Plaintiff,
against
THE CORNELL STEAMBOAT COMPANY, Defendant.

To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, New York, May 17, 1909.

E. CROSBY KINDLEBERGER,
Plaintiff's Attorney.

Post Office Address and Office, No. 32 Franklin Street, Manhattan, New York City.

5 *Complaint.*

New York Supreme Court, County of New York.

Action No. 1.

THE PHOENIX CONSTRUCTION COMPANY, Plaintiff,
against
THE CORNELL STEAMBOAT COMPANY, Defendant.

The complaint of The Phœnix Construction Company, the plaintiff above-named, against the defendant above-named, alleges as follows:

I. The plaintiff is a corporation duly organized and existing under the laws of the State of New York, having its principal office and place of business in the City and County of New York.

II. On information and belief that the defendant above-named is a corporation organized and existing under the laws of the State of New York, having its principal office and place of business in the City of Kingston, County of Ulster.

III. That on the 19th day of July, 1908, and prior thereto, the plaintiff was lawfully and peaceably engaged in the performance of work upon the waters of the Hudson River opposite Storm King in boring test holes in the bottom of said Hudson River. That said work was being prosecuted by this plaintiff pursuant to employment by the Board of Water Supply of the City of New York, which

Board was authorized, as plaintiff is informed and verily believes, by the laws of the State of New York to determine at what
6 place it should construct an aqueduct or tunnel under the bed of the Hudson River to allow waters accumulated on the west side of said Hudson River to pass to the east side of said Hudson River and thus to be conveyed to and distributed among the inhabitants of the City of New York.

IV. On information and belief that said Board of Water Supply of the City of New York had obtained from the Secretary of War of the United States, who by Act of Congress duly made and enacted is given jurisdiction of the premises, a permit to make certain borings at various lines in the Hudson River, to drive piles and anchor vessels, said permit having been granted February 21, 1906, and modified on March 22, 1907, and further modified on February 24, 1908, and, as so modified, was in full force and effect on July 19, 1908.

V. Plaintiff commenced the work of boring at Storm King on September 10, 1906, and as plaintiff is informed and verily believes, prior to said time, said Board of Water Supply of the City of New York notified the defendant as well as owners of all vessels frequently passing said borings that said work was to be carried on in that vicinity.

VI. That said work of boring pursuant to such permit was being carried on on the night of July 19, 1908 by this plaintiff, there being at that time four borings in progress, known as borings Nos. 20, 22, 23 and 21 respectively. All of said borings were on a line, boring No. 21 being the furthest west and boring No. 23
7 five hundred and seventy-five (575) feet east of boring No. 21; boring No. 20 being still further to the eastward of boring No. 23, and boring No. 22 near the east shore of the Hudson River. That at said time there were at that part of the Hudson River at the line of said borings two channels, one of water over twenty-five (25) feet in depth at mean low water with a width of over four hundred (400) feet; and the other of water over thirty (30) feet in depth at mean low water with a width of over six hundred (600) feet in the clear as provided in said permit of the War Department of the United States as modified on said 24th day of February, 1908. There were scows or pile drivers at each of said borings aforesaid, and watchmen there attending to their duties, and proper lights were displayed on said scows, pile drivers and borings as provided by law. Scow C. was attached to said boring No. 21. Each of said borings *were* composed of various lengths of wrought iron pipe and boring No. 21 was surrounded by a small platform. Drilling by this plaintiff was actually in progress on said boring No. 21 on said 19th day of July, 1908. The drill had attained a depth of four hundred and seventy-five (475) feet below the surface of the Hudson River at the time of the happenings hereinafter described.

VII. On information and belief, that on the night of July 19, 1908, at about the hour of 9:30 in the evening, the tide being ebb, but the night clear with a little or no wind blowing, the steamtug

Victoria, owned and operated by the defendant, came down the Hudson River and attached to Scow C and the master of said steamtug then and there stated to those on board Scow C
8 that said steamtug had come for the purpose of assisting the steamtug Pocahontas which was owned and operated by the defendant in bringing the tow of said Pocahontas through the channel between said borings. Shortly thereafter said steamtug Pocahontas, owned and operated by said defendant was seen approaching said line of borings having in tow a large number of canal boats, the tow being made up in tiers. The said tug and tow *was* seen heading down stream as if to proceed in the channel to the westward of said boring No. 21 and said scow C, where large numbers of vessels frequently proceeded. When said steamtug Pocahontas and said tow were but a short distance above said boring No 21 and said scow C, said steamtug Victoria, having previously cast off from boring No. 21, negligently blew two blasts of her whistle and said steamtug Pocahontas thereupon negligently altered her course to the eastward as if to pass to the eastward of boring No. 21 and scow C, and to use the channel between said boring No. 21 and scow C and said boring No. 23 and scow A. In changing her course said steamtug Pocahontas negligently, and incorrectly estimated the tide and sheered to port, and said steamtug passed said boring in safety, but the canal boats in tow of said steamtub Pocahontas sheered with the ebb tide partly broadside across the river and the starboard side of one of the tiers of canal boats struck boring No. 21 a violent blow, breaking the anchor lines, bending the platform, pipes and drill and drill rods so that they were all under water. The steamtug Victoria made no attempt whatsoever to straighten the tow or to aid said tow of the said steamtug Pocahontas
9 in any way.

VIII. On information and belief, that the damage to said boring was not caused or contributed to by any negligence of this plaintiff, its agents, servants or employés, but was wholly caused by the negligence and carelessness of the defendant, its agents, servants and employés on board said steamtugs Pocahontas and Victoria.

IX. By reason of said canal boats striking against and over said boring No. 21, as aforesaid, a large part of the piping in said boring, anchors and anchor lines were wholly lost, the platform and scow C were damaged, the service of a wrecking crew and derrick, pile driver and towing for a number of days were required to replace said boring and recover the property of this plaintiff, and this plaintiff was compelled to expend in all the sum of Three thousand five hundred ninety-one dollars and forty-three cents ($3,591.43).

Wherefore, plaintiff demands judgment against the defendant above named for the sum of Three thousand five hundred ninety-one dollars and forty-three cents ($3,591.43) together with interest thereon from the 19th day of July, 1908, together with the costs of this action.

E. CROSBY KINDLEBERGER,
Attorney for Plaintiff.

Office and Post Office Address, No. 32 Franklin Street, New York City.

10 STATE OF NEW YORK,
County of New York, ss:

Francis W. Belknap being duly sworn, deposes and says, That he is the Secretary of the Phœnix Construction Company, the plaintiff above named. That he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

That the reason why this complaint is not verified by the plaintiff is that said plaintiff is a corporation, and that deponent verifies the same as an officer of said corporation, and from knowledge and information derived from statements made to him by officers and agents of said plaintiff and from his personal knowledge of the business affairs of said corporation.

FRANCIS W. BELKNAP.

Sworn to before me this 14th day of May, 1909.
ARTHUR C. HUTCHESON,
Commissioner of Deeds,
City of New York.

11 *Answer.*

New York Supreme Court.

Action No. 1.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
against
THE CORNELL STEAMBOAT COMPANY, Defendant.

The defendant, Cornell Steamboat Company, for answer to the complaint of the plaintiff in this action, respectfully alleges and shows to the Court:

First. It is admitted that the plaintiff is a corporation of the State of New York as alleged in the complaint.

Second. It is admitted that the defendant is a duly organized domestic corporation of the State of New York, having its principal office and place of business in the City of Kingston, Ulster County, New York.

Third. It is admitted that on July 19, 1908, at about the hour of 9:30 in the evening, a canal boat in tow of the steamtug "Pocahontas," which steamtug was at that time owned and operated by the defendant, came in collision with a boring machine of the plaintiff in the navigable channel of the Hudson River, at or near Storm King and Breakneck Mountains, damaging such machine.

Fourth. Upon information and belief this defendant denies
12 each and every of the allegations of the complaint other than as above admitted.

Fifth. Upon information and belief this defendant denies that such collision was caused by any negligence on the part of the defendant, its agents or servants operating said steamtug; but alleges that whatever damage the plaintiff sustained was caused by the negligence of the plaintiff, its agents, servants or employés.

Sixth. Upon information and belief this defendant repeating all the allegations hereinbefore stated as if the same were here re-stated and re-alleged, alleges that the structure of the plaintiff was unlawfully placed in the navigable waters of the Hudson River, and that the plaintiff at the time of said collision was unlawfully, improperly and unnecessarily interfering with the navigation upon the Hudson River, such river being one of the navigable streams of the United States, in the State of New York.

Wherefore, this defendant prays judgment dismissing the complaint of the plaintiff, with costs of the action.

AMOS VAN ETTEN,
Attorney for Defendant.

Office and Post Office Address, 22 Ferry St., Kingston, N. Y.

13 STATE OF NEW YORK,
County of Ulster, ss:

S. D. Coykendall being duly sworn, deposes and says, that he is President of the Cornell Steamboat Company, the defendant in this action, and that an order appointing said Mr. Charles F. Brown may thereof; that the same is true to the knowledge of deponent, except as to matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Deponent further says, this verification is made by him because the defendant is a corporation and deponent is an officer thereof, to wit: President.

S. D. COYKENDALL.

Sworn to before me this 26th day of June, 1909.

HERMON T. WOOD,
Notary Public.

14 *Order Appointing Referee.*

Supreme Court, New York County.

Action No. 1.

THE PHOENIX CONSTRUCTION COMPANY, Plaintiff,
vs.
CORNELL STEAMBOAT COMPANY, Defendant.

Upon reading and filing the annexed stipulation signed by the attorneys for the parties hereto consenting to the appointment of Charles F. Brown, Esquire, Attorney and Counselor at Law, as

Referee to hear and determine all the issues in the above entitled action, and that an order appointing said Mr. Charles F. Brown may be entered without further notice, upon motion of E. Crosby Kindleberger, Attorney for the plaintiff herein, it is

Ordered that Charles F. Brown, Attorney and Counselor at Law, of No. 60 Wall Street, Borough of Manhattan, City of New York, be and he hereby is appointed referee to hear and determine the whole issues in the above entitled action, both of Fact and of Law, and to render his decision upon the same, and file it with the Clerk of this Court, and to exercise all the general powers of a referee, as prescribed by the Code of Civil Procedure.

Dated, New York, Dec. 17, 1909.

PETER J. DOOLING, *Clerk.*

15 *Stipulation for the Appointment of Referee.*

Supreme Court, New York County.

Action No. 1.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
against
THE CORNELL STEAMBOAT COMPANY, Defendant.

The Clerk of the County of New York, having hereto on Oct. 2, 1909, made an order pursuant to stipulation signed by the attorneys of the parties herein, appointing Harrington Putnam, Esquire, Referee in the above entitled case, pursuant to Section 1011 of the Code of Civil Procedure of the County of New York, and said Harrington Putnam, being thereafter disqualified to act as such Referee, by being appointed a Justice of the Supreme Court of the State of New York;

Now, pursuant to the provisions of Section 1011 of the Code of Civil Procedure of the State of New York, it is hereby stipulated and agreed by and between the attorneys for the plaintiff and defendant in the above entitled action that the said action, now pending in this court to recover damages for the alleged negligence of the defendant, and now being on the Trial Term Calendar of this Court of the County of New York, numbered 5666, be referred to Charles F. Brown, Esquire, Attorney and Counselor at Law, of No. 60 Wall Street, in the County of New York, to hear and determine all the issues in said action, both of fact and of law, and to exercise
16 all the powers of a Referee as set forth in the Code of Civil Procedure.

It is further stipulated that an order carrying out the terms of this stipulation be entered without further notice.

Dated, December 17, 1909.

E. CROSBY KINDLEBERGER,
Attorney for Plaintiff.
AMOS VAN ETTEN,
Attorney for Defendant.

Decision.

Supreme Court, New York County.

Action No. 1.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
vs.
CORNELL STEAMBOAT COMPANY, Defendant.

To the Supreme Court of the State of New York:

Pursuant to an order of this court entered herein on the 17th day of December, 1909, referring it to me to hear and determine the whole issues in the above entitled action both of fact and of law and to render my decision upon the same, and to exercise all the general powers of a referee prescribed by the Code of Civil Procedure,
17 I the undersigned, as referee report; that the parties whose interest could be affected by the result of the reference being corporations and present by attorneys, the referee's oath was expressly waived. I thereupon heard the allegations and evidence of the parties being attended by E. Crosby Kindleberger, Esq., of counsel for plaintiff and by Amos Van Etten, Esq., and Harry F. Fleming, Esq., of counsel for defendant.

Now, after hearing E. Crosby Kindleberger, Esq., attorney for the plaintiff and Amos Van Etten, Esq., attorney for the defendant, and due deliberations having been had, I decide and find as follows:

Findings of Fact.

I. The plaintiff is a corporation organized and existing under the laws of the State of New York, having its principal office in the County of New York.

II. The defendant is a corporation organized and existing under the laws of the State of New York, having its principal office in the County of Ulster, City of Kingston.

III. Prior to and at the time of the collision, the subject of this action, the Board of Water Supply of the State of New York under authority of a statute of the State of New York was engaged in making test borings in the bed of the Hudson River near Storm King.

Except to so much as under authority from state.

18 IV. That the making of such test borings was part of a great public improvement to wit: As part of the work of the construction of an aqueduct to supply the inhabitants of the City of New York with pure water.

Except to great public improvement.

V. That the Board of Water Supply of the City of New York, prior to the happening of this collision, had duly made a contract with the American Diamond Rock Drill Company, that said contract was thereafter modified and that thereafter said contract was duly

assigned to this plaintiff by the American Diamond Rock Drill Company, such assignment receiving the consent of the Board of Water Supply of the City of New York.

Except to contract as duly made or that assignments received consent of Board of Water Supply.

VI. That after the contract had been assigned to the plaintiff, the plaintiff proceeded with the work of making these test borings at Storm King aforesaid, using its own plant and employing its own workmen.

VII. That thereafter and prior to the happening of this collision, the Board of Water Supply of the City of New York made a further modification of this contract by agreement with the plaintiff.

Except.

VIII. That prior to the making of the test borings the Board of Water Supply of the City of New York made an application
19 to the Chief of Engineers of the United States Army to drive pipe and anchor vessels near New Hamburg and that the granting of this application was recommended by the Chief of Engineers of the United States Army, and permission to do this work was granted by Robert S. Oliver, Acting Secretary of War on the 2nd day of February, 1906.

Except.

IX. That thereafter application was made by the Board of Water Supply of the City of New York to change the location of the borings from New Hamburg to Storm King and on the 22nd day of March, 1907, Colonel Lockwood of the Corps of Engineers of the United States Army wrote the Board of Water Supply of the City of New York that by the authority of the Secretary of War the permit of July 2nd, 1906, was modified so as to permit the work to be carried on at Storm King.

Except as a finding of testimony and not a finding of fact.

X. That on the 24th day of February, 1908, Colonel John G. D. Knight of the Corps of Engineers of the United States Army, signed a letter granting permission to the Board of Water Supply of the City of New York to anchor vessels at the Storm King line. In the said letter it was provided that there should not be in progress simultaneously on said line, more than four borings, and that there should be left unobstructed during the progress of the boring work two channels, one of at least 25 feet depth at mean low water with
20 a width of at least 400 feet in the clear, and the other of at least 30 feet depth at mean low water and with a width of at least 600 feet in the clear.

Except to as a finding of evidence and not a finding of fact.

XI. That at the time of the happening of this collision there was to the west of boring No. 21, a channel over six hundred feet in width and of a depth of at least thirty feet at mean low water and between borings 21 and 23 there was a channel at least 400 feet in width of water at least 25 feet in depth at mean low water.

XII. That the channels herein above described in the XI finding were amply sufficient for the passage of vessels and tows and that a

large number of tows and vessels had safely passed through said channels between the borings during the years 1907 and 1908.

Except.

XIII. That prior to the collision, the defendant had been notified of the location of each of the vessels of the plaintiff at each of the borings.

Except.

XIV. That the defendant was familiar with the position of the vessels of the plaintiff at each one of the borings.

Except.

XV. That officials of the United States Government had
21 prescribed that during the night, white anchor lights should be maintained upon each vessel located at each of the borings.

Except.

XVI. That on the night in question the plaintiff maintained proper and adequate white lights upon each one of its vessels located at each one of the borings.

Except.

XVII. That on the night on which the collision occurred the lights maintained by the plaintiff on each of its vessels located at the respective borings were visible for over a mile.

Except.

XVIII. That on the night of July 19, 1908, the following borings were in position on the line at Storm King: Boring No. 21, which was 718 feet from the west shore of the Hudson River; boring No. 23 which was 599 feet east of boring No. 21; boring No. 20, which was 242 feet east of boring No. 23; boring No. 22, which was 452 feet east of boring No. 20; and 780 feet west from the east bank of the Hudson River.

XIX. The following vessels of the plaintiff were located at the following borings on the night of July 19, 1908: Boring No. 21, Scow C; boring No. 23, Scow A; boring No. 20, Scow B and boring No. 22, Pile Driver No. 1.

XX. That each of these vessels mentioned in finding numbered XIX were securely anchored with their bows and sterns up
22 and down stream and their position was fixed. At boring No. 21 there was a wooden platform clamped upon the boring and the diamond drill of the plaintiff was being driven into the rocks by the employés of the plaintiff who continued working that night until a few moments before the collision.

XXI. That boring No. 21 was composed of iron pipe of various sizes, the smallest of which had attained a depth of 478 feet below the surface of the water.

XXII. That the greatest depth obtained by boring No. 21 was 479.7 feet, and that at this point, the diamond drill had drilled 6 or 7 feet into the rock at the bottom of the Hudson River.

XXIII. That on the night of July 19, 1908, at the time the collision occurred the tide was running strong ebb, and there was practically no wind.

XXIV. That at and near boring No. 21, the ebb tide sets towards

the east with a tendency to carry vessels and other objects in a southeasterly direction.

XXV. That the tug Pocahontas owned by the defendant was the leading tug of the defendant's tow that collided with boring No. 21 on the night of July 19, 1908.

XXVI. That the Pocahontas was a tug 120 feet in length and of considerable power.

XXVII. That at the back of the tug Pocahontas at the
23 time of the accident was a hawser 500 feet in length connecting with the head tier of the tow.

XXVIII. That the tow was made up of 27 canal boats, 4 constituting each tier, and there being 7 tiers with three boats in the stern tier.

XXIX. That 26 of the canal boats were loaded and one of them was light, and that the average loaded canal boat with its cargo weighed three hundred tons.

XXX. That the tow was about 90 feet wide and the entire length of the tow including the hawser, tug and canal boats was about 1,320 feet.

XXI. That in changing the course of a loaded tow time must be given to shape the course.

Except.

XXXII. That Captain Pratt who commanded the defendant's tug Pocahontas was notified that the plaintiff had recently located a scow at boring No. 23 and was well aware of the location of that scow as his tug approached the borings.

Except.

XXXIII. That on the night of July 19, 1908, prior to the happening of the collision the tug Victoria, owned by the defendant, went ahead of the tow and laid just south of the scow C at boring No. 21 until shortly before the tug Pocahontas approached the line of the borings.

XXXIV. That the tug Pocahontas passed boring No. 21 about 150 feet to the east of it.

24 XXXV. That the captain of the Pocahontas in fixing his course so close to boring No. 21, under the circumstances, was negligent, and that fact helped to bring about the collision.

Except.

XXXVI. That but a short time before the happening of the collision the captain of the Pocahontas changed the course of the tug to the eastward.

Except.

XXXVII. That the change of the course of the tug Pocahontas to the eastward under the condition of the tide that prevailed, swung the tail end of the tow to the west and closer to scow C, located at boring No. 21.

Except.

XXXVIII. That the change in the course of the tug Pocahontas, under the circumstances, was negligent and was one of the causes of the collision.

Except.

XXXIX. That the captain of the tug Victoria was also negligent in failing to give timely signals to the Pocahontas and in failing to take measures to push the rear of the tow over towards the east.

Except.

XL. That the starboard side of the canal boat Howard
25 Steller which was on the starboard side of the tow and on the third tier from the end, hit scow C and the platform on boring No. 21.

XLI. That the force of the collision drove scow C 50 feet to the south and west of her former position.

XLII. That the force of the collision bent the pipe which composed the boring, over towards the south, the bend happening about 67 feet below the surface of the water.

XLIII. That as a result of the collision, scow C had a number of planks damaged, a skiff alongside of scow C was damaged, anchors were lost, also cables, diamonds out of the Diamond Drill, a quantity of pipe was rendered useless, the platform was smashed, and a number of tools upon the platform at the time of the collision were lost.

XLIV. That after the accident plaintiff was obliged to procure the service of a derrick of the Merritt & Chapman Wrecking Co., and a pile driver of the plaintiff with a number of men were required for 57 days to put the pipes in such a condition that the boring work could be resumed.

XLV. That the total charge for materials lost or destroyed and the expenses necessarily incurred in restoring the plant to a condition to permit the resumption of work was 3,347.83.

XLVI. That during the course of restoring the work the plaintiff used its launch 57 days. That this launch was at work
26 at the three other borings of the plaintiff during this time. That one-quarter of the wages of the men on the launch, and the coal required to run the same for fifty-seven days was $85.50.

XLVII. That neither plaintiff nor any of its servants or employés performed any negligent acts that contributed to the collision.

Except.

Conclusions of Law.

I. That the agents, servants and employés of the defendant were guilty of such negligence as entitles the plaintiff to recover the damages it sustained thereby.

Except.

II. That the plaintiff is entitled to recover from the defendant as damages the sum of $3,347.83 being for all the damages claimed by the plaintiff except the sum of $85.50, a charge for the use of the plaintiff's launch for 57 days.

Except.

I accordingly direct judgment for plaintiff against defendant for the sum of $3,347.83 with costs to be taxed.

Except.

CHAS. F. BROWN, *Referee.*

Dated, August 15, 1910.

27 *Requests to Find.*

New York Supreme Court.

Action No. 1.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
vs.
THE CORNELL STEAMBOAT COMPANY, Defendant.

This action having been tried before a referee without a jury the above defendant requests the Referee to find the following

As Matters of Fact.

I. Plaintiff is a duly organized corporation.

Found. C. F. B.

II. Defendant is a duly organized corporation of the State of New York.

Found. C. F. B.

III. On the 19th day of July, 1908, the plaintiff had anchored in the navigable waters of the Hudson River, at and opposite Storm King Mountain, at the lower end of Newburgh Bay, certain boring plants for the purpose of testing the bottom of the Hudson River at that point.

Found. C. F. B.

IV. These borings in the bottom of the river were for the purpose of ascertaining the formation and character of the bed of the river.

Found. C. F. B.

28 V. They were being carried on to obtain such information to determine whether or not a tunnel could be carried under the river, which tunnel was to lead from a reservoir in process of construction in Ulster county, to supply water for the City of New York.

Found. C. F. B.

VI. Prior to the making of these borings, and while they were being prosecuted, neither the plaintiff nor defendant had knowledge of what obstacles or difficulties might be encountered in the bed of the river as the work progressed.

Found. C. F. B.

VII. The plaintiff had failed to show any lawful authority to anchor and maintain its drilling plants and barges in the navigable waters of the Hudson River at the place where plant No. 21 was injured.

Found. C. F. B.

VIII. Plaintiff has failed to show that it was authorized by any Act of Congress to take its boring plants in the Hudson River at the place or places where the boring plants and barges were anchored.

Found. C. F. B.

IX. Plaintiff has failed to show that it had authority from the legislature of the State of New York to anchor and maintain its drilling plants and barges at the place or places where they were injured.

Refused. C. F. B.

29 X. The evidence fails to show that the plaintiff was lawfully engaged in the performance of work upon the waters of the Hudson River opposite Storm King.

Refused. C. F. B.

XI. The evidence does not show that the Board of Water Supply of the City of New York had obtained from the Secretary of War of the United States a lawful permit to make borings and anchor vessels in the Hudson River, at and opposite Storm King Mountain, on said July 19th, 1908, or at any time prior thereto.

Found. C. F. B.

XII. On July 19th, 1908, in the evening, at about nine o'clock, there were four plants located in the navigable waters of the Hudson River at and opposite Storm King Mountain. The most westerly plant was known as No. 21, which was located about 750 feet from the water-line of the west shore of the river; easterly of plant 21, and at a distance of about 600 feet, was plant 23; easterly of plant 23, and at a distance of about 250 feet, was plant 20; easterly of plant 20, at a distance of about 350 feet, was plant 22, which plant was located about 650 feet from the east shore of the river.

Found as in decision. C. F. B.

XIII. Plant No. 21 consisted of a boring, platform and scow attached thereto, making an object about 40 feet in length and about 20 feet in width, with cables extending on either side by which the scow was anchored, and these cables ran in a slant-
30 ing direction, easterly and westerly, from the platform to the bottom of the river and at a distance of 15 or 20 feet from the platform, showing a depth below the surface of the water of not to exceed six and a half or seven feet.

Found. C. F. B.

XIV. Plant No. 21 was anchored in the usual and ordinary course that tows navigated in passing this place in going down the river on an ebb tide.

Found. C. F. B.

XV. Plant No. 21 had been located and placed in the river about the first of April, 1908 and from that time until July 17th there had been an open space for navigation between plants 21 and 20 of about 850 feet.

Found. C. F. B.

XVI. On July 16th, 1908, plant 23 was placed, making the space between plants 21 and 23 about 600 feet.

Found. C. F. B.

XVII. On July 19th, 1908, Captain Pratt, of the tug "Pocahontas," for the first time navigated a tug and scow between plants 21 and 23.

Found. C. F. B.

XVIII. There is no evidence to sustain the charge of fault alleged in the complaint that the steamtug "Victoria" negligently blew two whistles to the steamtug "Pocahontas."

Found. C. F. B.

31 XIX. The only fault or negligence charged against the defendant in colliding with plant 21, is that the "Pocahontas," the steamtug in charge of the tow, negligently altered her course as she approached these plants.

Refused. C. F. B.

XX. The plaintiff did not show by competent evidence any lack of skill or diligence on the part of the master of the tug "Pocahontas."

Refused. C. F. B.

XXI. Plaintiff's evidence cannot be construed to show more than an error of judgment on the part of Captain Pratt in navigating the tug and tow.

Refused. C. F. B.

XXII. The evidence introduced by the plaintiff does not show negligence on the part of the defendant.

Refused. C. F. B.

XXIII. It was not negligence on the part of Captain Pratt to change or modify his course in approaching these drills, if, in his opinion and good judgment, a change was proper when it for the first time appeared that there was any danger.

Refused. C. F. B.

XXIV. It was negligence on the part of the plaintiff to anchor these drills without some inquiry from navigators, or men
32 familiar with navigation, as to their proper location so as not to impede navigation unnecessarily.

Refused. C. F. B.

XXV. The collision on the night of the 19th of July, 1908, was, one of the boats in the tow struck the cable running from the scow some little distance from the plant.

Refused. C. F. B.

XXVI. The narrow pas-age at the lower end of Newburgh Bay between Storm King and Breakneck Mountains, where these drills

were placed, is considered by navigators the most dangerous point in the Hudson River to navigate.

I find it is a dangerous point. C. F. B.

XXVII. With plaintiff's drills placed in this narrow channel of the river, all the navigators sworn at the trial agree, navigation through that place was exceedingly difficult and very dangerous.

Found as amended. C. F. B.

As Matters of Law.

I. The plaintiff in this action cannot recover upon any other charge of negligence than that set forth in the complaint.

Found. C. F. B.

II. The happening of a collision between this tow and the derrick was not, under the circumstances, prima facie evidence of negligence.

Found. C. F. B.

33 III. Every presumption to be drawn from the evidence in this case is in favor of an absence of fault on the part of those navigating the tug.

Found. C. F. B.

IV. The evidence of the navigators and those in command of the tug, as to proper navigation, is entitled to more weight than the evidence of those on the drills.

Refused. C. F. B.

V. A mere error of judgment on the part of Captain Pratt, the navigator of this fleet, did not constitute negligence.

Found. C. F. B.

VI. Without any evidence of a competent witness showing that under like circumstances a navigator using ordinary skill and care would have done differently, there was a failure of proof to show negligence on the part of Captain Pratt.

Refused. C. F. B.

VII. Plaintiff's complaint should be dismissed, with costs.

Refused. C. F. B.

AMOS VAN ETTEN,
Attorney for Defendant.

34 *Exceptions.*

Supreme Court, New York County.

Action No. 1.

THE PHOENIX CONSTRUCTION COMPANY, Plaintiff,
vs.
CORNELL STEAMBOAT COMPANY, Defendant.

The defendant, the Cornell Steamboat Company excepts to the Findings of Fact determined by the referee as follows:

I. Exception is taken to that portion of the third finding of fact that prior to and at the time of the collision, the subject of this action, the Board of Water Supply of the State of New York under authority of a statute of the State of New York, was engaged in making test borings in the bed of the Hudson River near Storm King.

II. Exception is taken to so much of the fourth finding of fact as finds, "That the making of such test borings was a part of a great public improvement."

III. Exception is taken to so much of the fifth finding of fact as finds that the contracts therein referred to were duly made and duly assigned, and to such part as finds, "such assignment receiving the consent of the Board of Water Supply of the City of New York."

IV. Exception is taken to the seventh finding of fact, "That thereafter and prior to the happening of this collision, the Board of Water Supply of the City of New York made a further
35 modification of this contract by agreement with the plaintiff."

V. Exception is taken to the eighth finding of fact, "That prior to the making of the test borings the Board of Water Supply of the City of New York made an application to the Chief of Engineers of the United States Army to drive pipe and anchor vessels near New Hamburg and that the granting of this application was recommended by the Chief of Engineers of the United States Army, and permisssion to do this work was granted by Robert S. Oliver, Acting Secretary of War, on the 2nd day of February, 1906."

VI. Exception is taken to the ninth finding of fact, "That thereafter application was made by the Board of Water Supply of the City of New York to change the location of the borings from New Hamburg to Storm King and on the 22nd day of March, 1907, Colonel Lockwood of the Corps of Engineers of the United States Army wrote the Board of Water Supply of the City of New York that by the authority of the Secretary of War the permit of July 2nd, 1906, was modified so as to permit the work to be carried on at Storm King," generally and specifically for the reason that said finding is a finding setting forth certain testimony and not a finding of fact founded upon the testimony.

VII. Exception is taken to the tenth finding of fact, "That on

the 24th day of February, 1908, Colonel John G. D. Knight of the Corps of Engineers of the United States Army, signed a letter granting permission to the Board of Water Supply of the
36 City of New York to anchor vessels at the Storm King line. In the said letter it was provided that there should not be in progress simultaneously on said line, more than four borings, and that there should be left unobstructed during the progress of the boring work two channels, one — at least 25 feet depth at mean low water with a width of at least 400 feet in the clear, and the other of at least 30 feet depth at mean low water with a width of at least 600 feet in the clear," generally and specifically for the reason that said finding is a finding setting forth certain testimony and not a finding of fact founded upon the testimony.

VIII. Exception is taken to the eleventh finding of fact, "That at the time of the happening of this collision there was to the west of boring No. 21, a channel over six hundred feet in width and of a depth of at least thirty feet at mean low water and betweeen borings 21 and 23 there was a channel at least 400 feet in width of water at least 25 feet in depth at mean low water."

IX. Exception is taken to the twelfth finding of fact, "That the channels hereinabove described in the XI finding were amply sufficient for the passage of vessels and tows and that a large number of tows and vessels had safely passed through said channels between the boring- during the years 1907 and 1908."

X. Exception is taken to the thirteenth finding of fact, "That prior to the collision, the defendant had been notified of the location of each of the vessels of the plaintiff at each of the borings."

37 XI. Exception is taken to the fourteenth finding of fact, "That the defendant was familiar with the position of the vessels of the plaintiff at each one of the borings."

XII. Exception is taken to the fifteenth finding of fact, "That officials of the United States Government had prescribed that during the night, white anchor lights should be maintained upon each vessel located at each of the borings."

XIII. Exception is taken to the sixteenth finding of fact, "That on the night in question the plaintiff maintained proper and adequate white lights upon each one of its vessels located at each one of the borings."

XIV. Exception is taken to the seventeenth finding of fact, "That on the night on which the collision occurred the lights maintained by the plaintiff on each of its vessels located at the respective borings were visible for over a mile."

XV. Exception is taken to the eighteenth finding of fact, "That on the night of July 19, 1908, the following borings were in position on the line at Storm King: Boring No. 21, which was 718 feet from the west shore of the Hudson River; boring No. 23 which was 599 feet east of boring No. 21; boring No. 20, which was 242 feet east of boring No. 23; boring No. 22, which was 452 feet east of boring No. 20; and 780 feet west from the east bank of the Hudson River."

XVI. Exception is taken to the twenty-fourth finding of fact,

"That at and near boring No. 21, the ebb tide sets towards the
38 east with a tendency to carry vessels and other objects in a southeasterly direction."

XVII. Exception is taken to the thirty-first finding of fact, "That in changing the course of a loaded tow time must be given to shape the course."

XVIII. Exception is taken to the thirty-second finding of fact, "That Captain Pratt, who commanded the defendant's tug Pocahontas, was notified that the plaintiff had recently located a scow at boring No. 23 and was well aware of the location of that scow as his tug approached the borings."

XIX. Exception is taken to the thirty-fifth finding of fact, "That the captain of the Pocahontas in fixing his course so close to boring 21, under the circumstances, was negligent, and that fact helped to bring about the collision."

XX. Exception is taken to the thirty-sixth finding of fact, "That but a short time before the happening of the collision the captain of the Pocahontas changed the course of the tug to the eastward."

XXI. Exception is taken to the thirty-seventh finding of fact, "That the change of the course of the tug Pocahontas to the eastward under the condition of the tide that prevailed, swung the tail end of the tow to the west and closer to scow C located at boring No. 21."

39 XXII. Exception is taken to the thirty-eighth finding of fact, "That the change of the course of the tug Pocahontas, under the circumstances, was negligent and was one of the causes of the collision."

XXIII. Exception is taken to the thirty-ninth finding of fact, "That the captain of the tug Victoria was also negligent in failing to give timely signals to the Pocahontas and in failing to take measures to push the rear of the tow over towards the east."

XXIV. Exception is taken to the fortieth finding of fact, "That the starboard side of the canal boat Howard Steller which was on the starboard side of the tow and on the third tier from the end, hit scow C and the platform on boring No. 21."

XXV. Exception is taken to the forty-first finding of fact, "That the force of the collision drove scow C 50 feet to the south and west of her former position."

XXVI. Exception is taken to the forty-second finding of fact, "That the force of the collision bent the pipe which composed the boring, over towards the south, the bend happening about 67 feet below the surface of the water."

XXVII. Exception is taken to the forty-sixth finding of fact, "That during the course of restoring the work the plaintiff used its launch for 57 days. That this launch was at work at the three other borings of the plaintiff during this time. That one-quarter
40 of the wages of the men on the launch, and the coal required to run the same for fifty-seven days was $85.50."

XXVIII. Exception is taken to the forty-seventh finding of fact, "That neither plaintiff nor any of its servants or employés performed any negligent acts that contributed to the collision."

XXIX. The defendant excepts generally to each and all of the findings of fact upon the ground that they set forth certain testimony given on the trial and are not findings of fact based upon the testimony.

This defendant excepts to the Conclusions of Law, as found by the referee, as follows:

1. To the first conclusion of law, that the agents, servants and employés of the defendant were guilty of such negligence as entitles the plaintiff to recover the damages it sustained thereby.

2. To the second conclusion of law, that the plaintiff is entitled to recover from the defendant as damages the sum of $3,347.83, being for all the damages claimed by the plaintiff except the sum of $85.50, a charge for the use of the plaintiff's launch for 57 days.

This defendant further excepts to the refusal of the referee to find as matters of fact the following requests made by the defendant:

I. Exception is taken to the refusal of the referee to find
41 the ninth request to find that plaintiff has failed to show that it had authority from the legislature of the State of New York to anchor and maintain its drilling plants and barges at the place or places where they were injured.

II. Exception is taken to the refusal of the referee to find the tenth request to find that the evidence fails to show that the plaintiff was lawfully engaged in the performance of work upon the waters of the Hudson River opposite Storm King.

III. Exception is taken to the modification of the twelfth request to find that on July 19th, 1908, in the evening at about 9 o'clock, there were four plants located in the navigable waters of the Hudson River at and opposite Storm King Mountain. The most westerly plant was known as No. 21, which was located about 750 feet from the water line of the west short of the river; easterly of plant 21, and at a distance of about 600 feet, was plant 23; easterly of plant 23, and at a distance of about 250 feet, was plant 20; easterly of plant 20, at a distance of about 350 feet, was plant 22, which plant was located about 650 feet from the east shore of the river.

IV. Exception is taken to the refusal of the referee to find the nineteenth request to find that the only fault or negligence charged against the defendant in colliding with plant 21, is that the "Pocahontas," the steamtug in charge of the tow, negligently altered her course as she approached these plants.

V. Exception is taken to the refusal of the referee to find
42 the twentieth request to find that the plaintiff did not show by competent evidence any lack of skill or diligence on the part of the master of the tug "Pocahontas."

VI. Exception is taken to the refusal of the referee to find the twenty-first request to find that the plaintiff's evidence cannot be construed to show more than an error of judgment on the part of Captain Pratt in navigating the tug and tow.

VII. Exception is taken to the refusal of the referee to find the twenty-second request to find that the evidence introduced by the plaintiff does not show negligence on the part of the defendant.

VIII. Exception is taken to the refusal of the referee to find the

twenty-third request to find that it was not negligence on the part of Captain Pratt to change or modify his course in approaching these drills, if, in his opinion and good judgment, a change was proper when it for the first time appeared that there was any danger.

IX. Exception is taken to the refusal of the referee to find the twenty-fourth request to find that it was negligence on the part of the plaintiff to anchor these drills without some inquiry from navigators, or men familiar with navigation, as to their proper location so as not to impede navigation unnecessarily.

X. Exception is taken to the refusal of the referee to find the twenty-fifth request to find that the collision on the night of the 19th of July, 1908 was, one of the boats in the tow struck the cable running from the scow some little distance from the plant.

43 XI. Exception is taken to the modification of the twenty-sixth request to find that the narrow passage at the lower end of Newburgh Bay between Storm King and Breakneck Mountains, where these drills were placed, is considered by navigators the most dangerous point in the Hudson River to navigate.

XII. Exception is also taken to the refusal of the referee to find as Matters of Law the requests to decide as follows:

1. Exception is taken to the refusal of the referee to find the fourth request to find that the evidence of the navigators and those in command of the tug, as to proper navigation, is entitled to more weight than the evidence of those on the drills.

2. Exception is taken to the refusal of the referee to find the sixth request to find that without any evidence of a competent witness showing that under like circumstances a navigator using ordinary skill and care would have done differently, there was a failure of proof to show negligence on the part of Captain Pratt.

3. Exception is taken to the refusal of the referee to find the seventh request to find that plaintiff's complaint should be dismissed, with costs.

AMOS VAN ETTEN,
Attorney for Defendant,
Rondout, Kingston, N. Y.

44 *Judgment.*

Supreme Court, New York County.

Action No. 1.

THE PHOENIX CONSTRUCTION COMPANY, Plaintiff,
against
CORNELL STEAMBOAT COMPANY, Defendant.

This action having been referred by an order duly made and entered herein on the 17th day of December, 1909, upon the written consent of the parties hereto duly filed, to the Hon. Charles F. Brown, to hear and determine the whole issues and after trial had on due notice to all parties, said referee having on the 15th day of

August, 1910, duly made his report herein which was filed on August 19, 1910, in the office of the Clerk of the County of New York, stating the findings of fact herein and conclusions of law thereon and directing judgment as hereinafter stated, and the plaintiff's costs having been duly adjusted at Seven hundred eighty-six and 47/100 Dollars.

Now, on motion of E. Crosby Kindleberger, attorney for the plaintiff, it is

Adjudged, that the said plaintiff recover of the said defendant the sum of Three thousand three hundred forty-seven and 83/100 ($3,347.83) dollars awarded by the decision of the referee herein with interest thereon from August 15, 1910, to September 6, 1910, amounting to Twelve and 28/100 ($12.28) dollars and Seven hundred eighty-six and 47/100 ($786.47) dollars costs, making
45 together Four thousand one hundred forty-six and 58/100 ($4,146.58) dollars.

WILLIAM F. SCHNEIDER, *Clerk*.

Dated, New York, September 6, 1910.

Testimony.

Supreme Court, New York County.

Action No. 1.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
against
THE CORNELL STEAMBOAT COMPANY, Defendant.

Before Hon. Charles F. Brown, Referee.

NEW YORK, *February* 15, 1910—at 2 p. m.

Met before the Referee pursuant to notice.

Appearances:

E. Crosby Kindleberger, Esq., attorney for plaintiff.
Amos Van Etten, Esq., attorney for defendant.

It is stipulated that the oath of the Referee herein be and the same hereby is waived.

46 It is stipulated that the Referee be not limited in his charges herein to the statutory fees.

It is stipulated that the services of a stenographer are necessary; that Bryan W. Tichenor be and he hereby is employed as such stenographer, that he shall furnish three copies of his minutes, one for the Referee and one for each side, at the usual and customary rate in such cases, and that the amount paid him therefor shall be taxed against the losing party as a necessary cost of this reference.

It is stipulated that the testimony taken herein, not relating to the

facts of any particular accident, may be deemed to apply to all three actions, so far as the same is relevant.

Mr. KINDLEBERGER: The plaintiff offers in evidence a copy of a letter from the War Department, Washington, D. C., dated February 2, 1906, to Mr. J. Waldo Smith, Chief Engineer Board Water Supply, City of New York, 299 Broadway, signed Robert Shaw Oliver, Acting Secretary of War.

Mr. VAN ETTEN: It is objected to on the ground that the plaintiff in this action is in no way connected with that letter, that a permission given to the Board of Water Supply of New York City could not be assigned to the Phœnix Construction Company, and that the permit is immaterial.

Objection overruled; exception by defendant.

Said letter marked Plaintiff's Exhibit No. 1.

Mr. KINDLEBERGER: Now I offer in evidence copy of letter dated March 22, 1907, signed D. W. Lockwood, Colonel Corp- En-
47 gineers, United States Army, directed to the Board of Water Supply, City of New York, Mr. J. Waldo Smith, Chief Engineer.

Same objection, ruling and exception.

Same admitted and marked Plaintiff's Exhibit No. 2.

Mr. KINDLEBERGER: I offer in evidence letter addressed to the Board of Water Supply, City of New York, dated February 24, 1908, signed John G. D. Knight, Colonel Corp- of Engineers, U. S. A.

Same objection, ruling and exception.

Same admitted, marked Plaintiff's Exhibit No. 3.

It is stipulated for the purpose of this record that a contract was executed between the Board of Water Supply of the City of New York and the American Diamond Rock Drill Company, and that an assignment thereof was thereafter made by the Diamond Rock Drill Company to the plaintiff in this action.

It is understood that said contract will be produced and when so produced will be marked Plaintiff's Exhibit No. 4.

Mr. KINDLEBERGER: I also offer in evidence a copy of the assignment referred to.

Mr. VAN ETTEN: I object to the contract and to the assignment as immaterial and contract does not relate to the drills or holes in question.

The REFEREE: I will overrule the objection and admit them for the present at any rate.

Mr. VAN ETTEN: I except.

48 Said assignment marked Plaintiff's Exhibit No. 5.

Mr. KINDLEBERGER: The plaintiff offers in evidence a blueprint purporting to be made by the Division Engineer of the Board of Water Supply of the City of New York on July 21, 1908, on a scale

of 1 inch to 100 feet, showing the condition and location of river borings and scows on July 19, 1908.

Mr. VAN ETTEN: I object to it as not being the condition existing at the time of the collision.

The REFEREE: I will take it, without stating what it contains, and you may give proof as to its correctness and whatever it purports to show.

Same admitted, marked Plaintiff's Exhibit No. 6.

FRANCIS W. BELKNAP, witness sworn for plaintiff, testified:

Direct examination.

By Mr. KINDLEBERGER:

I am a contracting engineer and secretary of the Phœnix Construction Company, the plaintiff. The Phœnix Construction Company first started the work on the Hudson River between Storm King and Breakneck about July, 1906; had two pile drivers there. That same work was not going on in 1907 and 1908. In July, 1907, there was a modification of the contract which called for a more extensive plant, and we fitted out two large scows and sent them up there about the 1st of August, 1907. That year
49 we started work under what was called by the Board of Water Supply Amendment No. 1 of the original contract.

Q. Well just describe what materials you had and what work you did, in a general way?

A. When we were first ordered to change our location of work from New Hamburg to Storm King under the clause of the original contract which said "in the neighborhood of New Hamburg and along the shores of the Hudson River," the work that was done in the Fall of 1906 showed that the provisions of the original contract was insufficient to obtain the information desired on account of the great depth at which the rock lay at this crossing between Storm King and Breakneck, and in July, 1907, the first modification of the agreement was made calling for two special holes of a depth of 750 feet each. The contract price was modified, and in accordance with the increased price we fitted out larger scows, furnished them with very much heavier and larger wrought-iron pipe and commenced work on these two holes about the 15th of August, 1907. We worked on those two holes until it became dangerous to continue working longer on them on account of ice in the Hudson River.

By the REFEREE: They were located as shown on this drawing Exhibit 6 (witness points out Hole- No. 20 and 21). 21 is the hole in question. 20 is here (ind.); hole 22 was done under the original contract, and hole No. 23 was a further modification of the agreement. Hole 21 was about 700 feet from the west shore of the river. Hole 20 was about 700 feet from the east shore.
50 By Mr. KINDLEBERGER: As I said, we stopped work on those two holes when ice formed in the river, and as soon as the river was free of ice we started again in the spring of

1908. The pipe in the meantime having been disconnected when we discontinued work a sufficient depth below mean low water not to be a menace to navigation or to be interfered with by the ice. About April 1st, 1908, we again located our scows; at hole 21 we located one of our big scows, either A or B; at hole 20 we placed the other big scow, and at hole 22 piledriver No. 1, all the property of the Phoenix Construction Company. The men's wages were paid by our company; we paid every expense of the work and received every cent that accrued from it from the City. We alone were doing the work in the river at that place.

The contract for hole 23 was awarded to us about two months prior to the accident, and at that time we transferred one of the bigger scows from one of the other locations and put it at hole 23 to start that work, and put pile driver No. 6 at the other locality. I visited the work never less than once a week, but I do not remember the exact date when I went there.

By the REFEREE: It was within a week prior to the accident I was last there. At hole 20 there was half a railroad scow, 32 feet wide and 100 feet long and a similar large barge at hole 23, and at hole 21 there was scow C and a pile driver at hole 22.

By Mr. KINDLEBERGER:

Q. Now, describe the nature of the work in putting down one of these borings, and especially with regard to boring No. 21,
51 what work you did in putting it down, what you did and how the thing was done—state approximately?

A. I am under the impression we started with 15 inch pipe. In the large pipe it is impossible to obtain wrought-iron pipe in those large sizes, and it had to be steel pipe, 15 inch, and we run that down a depth of about 225 or 230 feet by lowering it into the water and inserting in the centre a wash-pipe—a pipe connected with the pump, which sent a jet of water down to the bottom of the larger pipe and forced the material up and over the sides, excavating and lowering the pipe. When we reached a depth of 225 or 230 feet the skin friction on the sides of the pipe from the mud from the river was so great as to make it advisable to put in another line of pipe. Then we put in a 12-inch pipe inside. That was sunk to a further depth, say about 350 feet from the surface of the water; and when it became impossible to drive it any further without endangering the couplings we put inside a line of 10-inch pipe. They were ordinary pipe couplings, except that for that purpose they are made extra long and they are threaded through the entire length of the coupling so that the two ends of the pipe butt in the coupling and that makes a stronger job. In other words, they are screwed together. Those couplings are bought but they are adjusted so that the pipe is connected on the work as we drive it down. The length of the pipe used is twenty feet, except when the going is hard and then we use a shorter length for fear we won't get the whole twenty feet down. After the 10-inch pipe was put in this boring, we started a line of 8-inch pipe, then
52 6-inch, then 4-inch, and then a line of 2½-inch, in the same way.

Q. What depth had you obtained on the 19th day of July, 1908?

Mr. VAN ETTEN: If he knows, or is it hearsay? Do you know or is it hearsay—what somebody reported to you.

By the REFEREE:

Q. Did you ever measure it yourself?

A. The depth of the pipe? I never measured it but I got paid for it. I got a written report from the Engineers of the Board of Water Supply stating that the pipe had been driven to that depth and that we should receive the money for that depth. Someone in our own employ measured it.

Q. Was this 700 feet all through mud?

A. The 700 feet we did not attain in this hole before the accident. That is one of the chief claims of damage. The outside pipe was driven practically through the mud down to the gravel. That was 230 feet, approximately, and then we started through the gravel and bowlders with the other layers. Whenever a bowlder was too big to be blasted to one side we drilled a hole in it, inserted a little piece of powder, drew the pipe back and fired the powder and split the bowlder and the pipe went down. The small cobbles were bailed out with a bailer, with a valve at the lower end of the bailer. That is dropped and there is a plunger inside of this so-called sand pump which draws up as you start to hoist and fills the barrel of a 10-foot section of pipe with small gravel and sand and that is dropped overboard and dropped again, all the coarse stuff is bailed out that way. In sand we don't bail, we merely wash.

53 By Mr. KINDLEBERGER:

Q. When was the first time after the 19th of July that you went up to this place?

A. The first train on the morning of the 20th. I met Mr. Frederick Coykendall, General Manager of the defendant company, there by appointment and he and I went to the scow together and viewed what could be seen, about quarter past 10 o'clock. The men had managed to get a rope around the pipe that was bent and lying on the river bottom, or lying close to the river bottom, and were endeavoring to bend this pipe back again, so that we could rescue the diamond drill which was on the platform, on top of the pipe, engaged in drilling at the time of the accident. I saw the men pulling on the rope. I stayed there until they recovered the diamond drill. Scow C had broken her anchors to the westward and down stream, and I asked Mr. Swift, in Mr. Coykendall's presence, please to triangulate the present location of the scow so that it could be seen on the chart, and it is shown with the dotted line here (ind. Pl'f's Exhibit No. 6).

Q. What did you say to Coykendall and what did he say to you about the accident?

A. Mr. Coykendall said he thought the accident had been caused by an easterly current. He told me to go ahead and repair the damage just as if I was doing it for myself. He said that he

thought such a current existed, so we took the launch and stopped the engines in her, run her to a point about 500 yards above the scow and stopped her engines and let her drift. The tide was ebb, just the same. We did it to show Mr. Coykendall the direction the ebb tide took in the river. The launch instead of drift-
54 ing to the eastward of scow C drifted until it nearly went aground here at the west shore (indc.), and then we started the engines again and took her away.

Cross-examination.

By Mr. VAN ETTEN:

Q. Was there one floating object or two floating objects at hole 21?

A. One. The driving of pipe was done from a scow. The reason why there was a little scow there instead of a piledriver was because the driving was finished and we were starting the diamond drill, and the diamond drill work was done from a small scow. Scow C was 20 by 30 or 35, and when I saw it on the morning of the 20th of July it was about at the point where the dotted line (on Pl'f's Exhibit 6) indicates. As I was standing on the bow of the scow it was very clearly evident that we were back of this line, that is that the scows no longer l-ned in with each other.

By the REFEREE:

Q. It had been moved to the south?

A. Prior to the accident when you stood on the bow of that scow, you looked across the bow of that one (ind.) and of that one (ind.), they were all right in one line.

By Mr. VAN ETTEN:

Q. So in your opinion, from the situation as you saw it on that morning, this scow had been driven over towards the west shore?

A. Driven south and west. The test that I made with the launch above there carried the launch in about a southwesterly direction.

Q. Now, this is the lower end, or practically the lower end of Newburgh Bay isn't it—that is where the river narrows up
55 after having been spread out in what is called Newburgh Bay?

Mr. KINDLEBERGER: I have a chart here of the Hudson River, Haverstraw and Newburgh, which I will offer in evidence, and that will show the situation.

Same admitted and marked Plaintiff's Exhibit 7.

A. Right in the narrowest part of the Hudson, right there. (The witness draws line across the river showing the borings between Breakneck and Storm King.) I am secretary of the plaintiff company which has its office at 41 Park Row, New York City, so that my time is principally spent there. As engineer of the company I went up every week to see that the work was progressing prop-

erly, and on these occasions I went out and made an examination each time.

That hole No. 21 was started in August or September, 1907.

At the start when we were handling a heavy pipe the big scow was there, when we were through with handling the pipe—Then it remained there during that Fall and at that time 23 was not there; 20 and 22 were there but they were not new holes.

Q. Now when were those four first put in; when was the first time they all four were in there?

A. About the first of June, 1908. This collision occurred on the 19th of July, so they had been there about six weeks.

Q. Had your company received any letters from the Cornell Steamboat Company or from the manager of the Cornell
56 Steamboat Company—prior to the 19th of July, when the accident occurred?

A. Not to my recollection, no. I am positive we had no letter.

Q. Had you prior to July, 1908, had a collision with some boat or had some boat collided with one of your scows there?

A. We suffered damage on the 30th of August, 1907, from the steamer Poughkeepsie; she broke her propeller shaft and collided with a boring, the location of which is not shown on this map.

Q. Now hadn't the Cornell Steamboat Company called your attention to these objects in the river there before the 19th of July?

A. No, they never had called our attention to objects in the river; we called their attention to them. I opened the mail and have no recollection of any letter about them.

Q. Now what employees or what crew were there at this plant of yours on that particular night? I am speaking generally of the men that you have on the machine.

A. Generally speaking, when there is no work going on in the night time we have a watchman on each scow, but on this occasion we were drilling. I was not there that night. There were three men, a drill runner and a couple of helpers; not over four men and not less than three. Our company had never before done work of this nature in the Hudson River prior to the placing of those drills there. We did the work at New Hamburg and Wappinger Creek—part of this contract. The company was incorporated in 1897 or 1898. We are engaged actively in harbor and river front improvement, dock building, pile-driving and foundation
57 work, mass concreting—anything of that general character, diving, submarine work. In 1906 when we first began work at this point on the Hudson River the location of the scows was arranged entirely by the Board of Water Supply and they surveyed each location exactly and made us move if we were not right; they fixed the point. In 1907 and 1908 Mr. George Hammond superintended the location of the scows, and in 1906 the location was done under the supervision of the American Diamond Rock Drill Company who started the contract. Mr. Hammond is a diamond drill expert; he is not a navigator or licensed pilot or man familiar with navigation. The morning I went there with Mr. Coykendall after this collision, they had a line around the bent

pipe and were trying to recover the diamond drill. By bent pipe I mean the pipe when it was collided with, bent at a point possibly 30 or 40 feet above the bottom of the river. This was the pipe that extended down into the river bottom; it was bent above the surface of the mud. The water there was about 90 feet deep. I know that from the government chart, and we took soundings there. The paper you show me is a profile which shows approximately the character of the material in the bottom of the Hudson River, as shown by the borings which we had taken at that time, and was made in the office of Mr. William E. Swift, Division Engineer, Board of Water Supply.

Same marked Defendant's Exhibit D-1 for identification.

When I say "they" were endeavoring to straighten the pipe I mean the crew on this plant.

There were four accidents, and other slight collisions which did not cause any great damage. I have a recollection that an
58 anchor line was broken one night on one of the easterly scows by a vessel of the Cornell Steamboat Company.

GEORGE A. HAMMOND, sworn for plaintiff, testified:

Direct examination.

By Mr. KINDLEBERGER:

I am in the drill business, prospecting, and have been for thirty years. Within the last years, I worked for the City of New York nine years; have prospected up through the country for dams and aqueducts in New Foundland, in British Columbia, with the United States Government four years in charge of borings, and have been with the Phœnix Construction Company since January, 1907. My particular business is borings and prospecting for bridge piers and mining properties, etc. In July, 1908, I superintended the work of the Phœnix Construction Company at Storm King and Breakneck Mountains; had something like 24 or 25 men working under my direction. I remember Sunday, the 19th day of July, 1908.

Q. Was any work being carried on on that day, to your personal knowledge?

A. This was on hole 21, we had a crew and were putting in 1¼ inch pipe. We had got to rock on that hole, but it was rough and the diamond bit didn't work well and we were afraid of losing it and we used shot until we got down in the rock far enough to get a piece of pipe in, and we left some of the shot in there and it was rolling around under the diamond bit and ruining it and in order to take it out we were putting in 1¼ inch pipe to form a
59 siphon to take the shot out and to go ahead with the diamond drill. In the afternoon about half-past 3 or 4 o'clock I left the work.

Q. Will you just describe the vessels and the plant of the Phœnix Construction Company used on the line of borings that Sunday?

A. We had four boats, pile-driver No. 1 was at boring No. 22; at

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No. 20 was scow B; at No. 23 was scow A, and No. 21 was drill boat C, which was a smaller boat.

Q. Now just describe the total apparatus at hole 21, whatever was there besides that boat?

A. We had a platform on the casing. By "casing" I mean the iron pipe. After the pipe was driven the pipe was anchored with three anchors tightened up and a platfrom hold by a clamp on the pipe; the drill frame was put on the platform and the drill set on the platform and we drilled from that, and when we pulled the rods out we pulled them from an extension we had on the boat. The top of the platform was about six feet above high water.

Q. With reference to the deck of the scow where was it?

A. The scow was pulled back about five and a half feet from the pipe, so the edge of the platform and the boat was about 1 foot difference between them. The platform was ten feet square, and was held up by a clamp on the pipe, and this was lowered down with a truss on and the pipe was anchored by three anchors running out diagonally. We had about 92 or 93 feet of water. On the scow there were six anchors, two abreast at each end sideways.

Q. Do you know what material was in the boring of hole 21 and how deep down you had got?

60 A. I couldn't give you the exact depth of the pipe, we had so many there, but we put in a 15-inch pipe, 12-inch, 10-inch, and 8, 6, 4 and 2½ inch, and if I remember correctly that hole at that time was about 489 feet. We had drilled about 6 or 7 feet down the edge of the rock, which ran in a slanting shape, and we had to get down and cut the side of it until we got a foot big enough for the diamond bit. We were working right on the outer edge of the rock. Daniel Lynn, drill man, and R. A. Young, fireman, and Charles Grover, helper, were working there when I left. The drill is worked by steam; we had a boiler on scow C. There was no work being done on scow A or scow B or pile-driver No. 1, only a watchman on each one of the boats.

Q. When did you first get to the job on the morning of the 20th of July?

A. About 8 or 8:10 o'clock. I then discovered that the scow C, which we found out later, was about 70 feet west and 100 feet downstream from the original point. Otherwise there was nothing but water; couldn't see platform or anything. I took a line and located the drill and platform—what was left of it—hanging over the up stream anchor line. The north-west anchor line caught and held the drill from going all the way to the mud—down about 70 feet, where it hung. The casing was bent. We found out later when we picked it up that it was bent down about 67 feet from mean high water. It stood up and was bent right over in that shape (ind.). The difference between high and low water up there is about four feet, ordinarily. We had a datum line to work from, which was mean high water. We got a line on this pipe and got another

61 pile driver out which we had ashore, and pulled it out and hoisted it up. Mr. Belknap came there somewhere between 10 and 11 o'clock in the forenoon. We hadn't pulled out anything yet;

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we had everything located and the lines fast so if anything happened we wouldn't lose it. We were waiting for Mr. Belknap and the representative of the Cornell people.

Q. Will you describe the distances between these various boats bginning at the Storm King side, the west side of the river, and tell how far they were apart?

A. Approximately, 21 was about 750 or 775 feet, I should judge, from the water line on the west side, and about 600 feet from boring No. 23; and it was about 250 feet from boring No. 20 to the east of No. 23. No. 22 was about 350 or 375 feet from No. 20, and it must have been 600 or 650 feet from boring No. 22 to the east side. We took 22 right out after that and started these all up again; we stopped 22 before it was finished, and were to use this channel but decided they wouldn't, and then hooked on the other again. We made soundings at each place. The depth of water at No. 21 was about 93 or 95 feet; at No. 23 about 65 feet, and at No. 20 about the same. At No. 22 I don't think it is over 40 feet there; it grows shallower all the way from 22 up the east side. The deep part of the river is on the west side and the channel runs on the west side; there is 30 feet of water on the west side 50 feet from shore. The ebb tide along there sets down. I have seen it set across towards the east and have seen it set the other way, and have seen it set straight down the river. We tried it with the launch, as Mr. Belknap said, at the suggestion of the representative of the Cor-
62 nell people, to see what it would do, and it drifted to the west.

Q. Now after the accident, what did you do to fix up the situation?

A. After Mr. Belknap had talked to me with the representative of the Cornell people, we pulled the drill out, got what pipe we could, hanging in the ways of an extra pile-driver and took it ashore. We saved about 60 feet of 10-inch, 8-inch, 6 and 4 and 2½ inch pipe. We broke the pipe off before when we shut down and we didn't put the 15 or 12-inch back on in the spring; and they sent a wrecker up there from one of Merritt & Chapman's wreckers. He was there two or three days. They took hold of the pipe below and pulled off the outside, a length of 6-inch, a short length, and I made a socket wrench of 8-inch pipe and had a diver go down and put a clamp on the 4-inch and we unscrewed that about 70 feet down, connected the pipe all up again, and put the drill to work again. That took three or four weeks.

Q. You were working there three or four weeks?

A. Yes, sir. I don't know how long it was, but it was quite a while. I know we got it all fixed up and used pile driver No. 1, and they came down a second time and then it was too late——

Q. Well, that is another case?

A. Yes, sir. We were working right at it till the second collision on that same hole.

Q. You are now referring to action No. 2, or accident No. 2 on October 30, that was the accident to the same pipe?

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A. I don't know the date without referring to my book, and I haven't it with me.

63 Q. Which took place last of the two last accidents in October? There were two very close together there.

A. That was hole 21.

Q. That was the last one?

A. Yes, I think so.

Cross-examination.

By Mr. VAN ETTEN:

Q. I understood you to say that the tide sets in various ways, it that correct?

A. I have seen it set straight down the river, and I have noticed it set a little to the eastward later in the season; it depends on the wind blowing, some, that might change it very little. I have seen it set across more to the east than it did at that time when we tried the launch. On the day of the first collision I spoke of, I left the plant in the afternoon, and the next I knew of affairs there was on the following morning. The accident happened in the evening, nine or ten o'clock.

Q. And when you left there you left three men on the plant?

A. Yes, sir—well, I didn't leave the men there, I left the men to go to work at seven o'clock—that is when they go to work. I left John Linn, a drill man, at hole 21 when I left the platform; I can't remember his helpers that he had that day.

By the REFEREE:

Q. They were to work until seven o'clock?

A. Yes, sir; they worked until about five o'clock, and when these men went off another man went aboard, and he stayed there till the other men came to work, and they put in their time at nights and went away in the morning. The two men I left there were

64 the day crew; they were not there when the accident happened.

By Mr. VAN ETTEN:

We worked nights because we were in a hurry to get this information, at all points. We always work at night when we have rock to drill. This platform was ten feet square and was clamped fast to the pipe and anchor lines went out from the pipe itself down at the water-line, in each direction. The scow wasn't fastened to the platform, that was anchored by itself, about a foot south of the platform, with three anchors in each direction, up and down the stream, to hold it from the action of the tide. The length of the plant that afternoon, including platform, scow and all, north and south, was probably forty or forty-five feet. The width of the boat was about twenty feet, and that projected out on each side of the platform, because we pulled directly from the center.

Q. Now, what was on that platform to show above the platform or was it just a level platform?

CLOSE IN CENTER

A. There was a diamond drill on it. The drill was about eight feet from the platform to the top of the drill-head. On the scow there was a boiler and engine, a small house and about five hundred or six hundred feet of drill rods and some coal; on the platform there was a lot of tools they were using, don't just remember what they were.

By the REFEREE:

We never slackened these anchor lines on the boat on account of the tide rising and falling, unless when we wanted to move. The boat wasn't fastened to the pipe at all, they were both independent. The barge didn't rise or fall over three or four feet, and that didn't do any harm.

65 By Mr. VAN ETTEN:

Q. Didn't it possibly sway to either side three or four feet in the action of the tide?

A. No. We had a launch and row boats to get to and from those plants to the shore. There was always a rowboat fastened to these plants laying alongside; as to which side, depended on the wind. That wouldn't be over four feet wide, and I don't think it would come out beyond the platform, to speak of. The launch was up at Cornwall; we didn't use that at night when we only had one crew out. We had regular fog bells on these plants for sounding alarms in case of fog. We had whistles, but we wouldn't be allowed to blow whistles when anchored, the way I understand it. There was a regulation fog bell on each boat. I don't think any whistles were blown; there was never any reported to me. I don't know whether there were any lights there that night when this collision occurred or not. I wasn't there.

Q. Is it your recollection that there were a number of slight collisions, such as boats running against your plants, at various times, that did not do any particular damage?

A. We never had any boats run up against our plant that I know of, only once in a while the Cornell people would pick up an anchor line going up or down. It was always reported.

Q. What do you mean by picking up an anchor line?

A. Why, they would swing the end out around—wouldn't give themselves quite room enough to swing.

Q. And would you say that was a common occurrence or not?

A. It wasn't so common; I think it happened three or
66 four times. This launch was about thirty-five feet long and about eight feet beam, and daytime it was on the job. We recovered some of this pipe. We went back and worked in the same place, got it all straightened out. A Merritt & Chapman wrecking plant came there by tow in the evening of the day after the collision, I think, and they were there the second day to go to work; don't remember whether the Cornell people brought them up or not. They were there two or three days. We had one of our own divers there too.

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ROBERT A. YOUNG, sworn for plaintiff, testified:

Direct examination.

By Mr. KINDLEBERGER:

I work for the Phœnix Construction Company as helper in diamond drill; am not employed at present. On July 19, 1908, I was working for that company on scow C. Went to work seven o'clock that night, which was Sunday. It got dark around eight o'clock. All the vessels had anchor lights on.

Q. Describe what you mean by anchor light and where it is placed?

A. A large light hanging on their ways, except the boat I was on, about twenty feet I guess. On scow C, I don't remember whether we had five or six lights. We had one of these large lights with glass in front on each side of the boat, and on the platform we had either three or four lanterns and a regular anchor light, which was hanging from the stern; had a stick up for it; that was twenty-five or thirty feet above the boat. All the lights were burning. It
67 was a nice clear night; I couldn't say as to stars out, but I think it was cloudless, and very calm, as I remember it. No wind at all. The tide was ebb, running down. Shortly after I went to work, besides the lights on our boat, I could see the lights of Cornwall, which is a little over a mile from boring 21, on the west side, and I could see the lights of Breakneck pretty distinctly.

Q. Now, about half-past nine that evening what did you observe with regard to any boat of the Cornell Steamboat Company?

A. Well, the first I saw any steamboat was when the Victoria, a tugboat, come from Cornwall direction down to the westward, between nine and ten o'clock; she came on the west side of boring 21 and scow C, between us and Storm King Mountain, and after she passed she made fast to us; she ran around the back of us and put a line on scow C, and lay astern of us with a line fast. I asked the captain of the Victoria what he was going to do, and he said he was going to help the tow through. We next noticed a tow coming down the river; I think it was off Cornwall when I first saw it. I knew it was a tow from the numerous lights on the tug. She had lights up on her mast. As to which side of us she was heading, she was some distance up the river then, but later on she looked as though she was going to the west. I heard the Victoria blow two whistles. She was fast to us, laying southwest of us, and backed off towards the west and blew two whistles; the other tug answered with two whistles; she at that time being between Cornwall and Dean's Point; pretty close to Dean's Point, which is not very far from the line of borings.

68 Q. What did the tug that was taking the tow do after she answered the two whistles?

A. She sheered east. The tow got pretty well across the river.

Q. What do you mean by "across the river?" How was the tow coming first?

A. Well, she swung crosswise with the river.

CLOSE IN CENTER

Q. Instead of being up and down the river, you say the two swung around almost across the river?

A. Yes, sir; in sort of a southeasterly direction.

Q. What did the captain of the Victoria say then, if anything?

A. We asked him if he thought she was going to hit us and he said he didn't think so. Then shortly he said, "You better get into the rowboat"—he said, "have you got a rowboat and if so we had better get into it."

Q. What did the Victoria do about whistles at that time?

A. He blew a number of short blasts.

Q. Did you notice whether or not the course of the Pocahontas and tow was even then or did it slacken up at any time?

A. She slacked up when she was right off from us, and almost immediately, she started up again, and the tow swung right around in front of the scow, knocked the frame down and broke an anchor line or so, knocked the scow back from the line a distance. We were between the west shore and the scow, having gotten into the rowboat. The tow was made up of either eight or ten tiers, I think, three wide; to the best of my knowledge there were about twenty-four to thirty canal boats, all loaded. I imagine they were three or four hundred feet behind the tug, but I couldn't say. I don't know the usual length of a hawser. I think it was a canal boat
69 in the third tier from the back end, about the center, that hit the platform and scow; I think it was the front of the third boat. It was the west side of the canalboat, the Storm King side; the starboard side going down. Just before the accident we were putting in a line of rods—one, one-quarter inch pipe. We were getting some shot out of the hole, hooking up a syphon to syphon out the hole for the diamond drill, and as soon as we got that out we were going to put in the diamond bit. There were three of us there, Charley Grover, Dan Linn and myself. I think we had about one hundred foot of rods in. The hole I think was near four hundred and eighty feet deep.

Q. Did you say anything to the captain of the Victoria when you heard these short whistles being blown?

A. Yes, asked him what he was doing that for, and he said he was doing it to arouse the people on the canal boats.

Q. You say you think the tow struck about the third tier?

A. Yes, sir; I think it was the third tier.

Q. Did any other vessels strike?

A. Well, they dragged right across the bow of the scow after knocking the platform down. As to boats in the back tiers hitting, I think the whole business dragged right down across, the three of them. By the "whole business" I mean all the boats on that side after the third tier from the end.

Q. What did the Victoria do after the accident?

Mr. VAN ETTEN: I object.

The REFEREE: He may show what the boat did.

70 Mr. VAN ETTEN: I except.

A. He came back and inquired if anybody was hurt or overboard,

or wanted to know what damage was done. We told him the casing was knocked down and the drill was overboard.

Cross-examination.

By Mr. VAN ETTEN:

Q. Was that a usual or unusual occurrence for a tug to come down and place itself alongside of the plant when a tow was coming?

A. I never saw them doing it before, but I haven't been in the habit of working nights, so I don't know whether that was a usual or an unusual thing.

Q. Was there anything said by you, or by the captain of the tug, about his doing it?

A. We just asked him what was the matter, thought he had some reason, but he didn't say anything to us at the time he did it, and when we asked him he said he was going to wait to help that tow through.

Q. Did any of you gentlemen offer any suggestions about it?

A. No, we didn't carry on any conversation, we were quite busy. Grover and I were on the platform, and Linn was running the engine, and we was making up the pipe as it was lowered down the hold. We would put a length on and that would be lowered down, and set a clamp on and then another length on top of that. We had lanterns on the platform and he had a large lamp with the engine. Our lamps were on top of the platform; that would be twelve feet above the surface of the water. The two lanterns
71 were on each side of the platform and the lamp enclosed with glass in front of it was on the deck of the scow. There was also an anchor light.

Q. What do you mean by an anchor light?

A. Well, I guess it is a regulation anchor light. It was hung up from the stern. It was a light they always have for the anchor light. It was up in its usual place. It is a round lantern opened around. I don't know who put it up that night. I did not put it up. I saw it; it was visible to us from the platform, because we were continually facing the way it was.

Q. What time was it put up? When did you first see it?

A. I think John Linn put it up. I first saw it about half-past seven. That was generally the first thing that was done, to hang up the lantern. The tow when we got in the rowboat was very close to us, three hundred feet distant, or more, maybe. There was one tug on this tow. From the time we got into the rowboat then we started to go towards the shore.

Q. And you did not see very much of what took place after that, did you?

A. We saw most of it. We went back on the boat after that. The tow then had passed by. The Victoria lay right in towards the west of our scow. She was there when we came back. She went down the river a little ways, possibly gone five minutes, and then came back to us, and finally she went on down the river and found the tow.

LOSE IN CENTER

Q. Now, were there any other boats in this vicinity about this time?

A. No, I didn't notice any if there were. If they went by I would see them surely.

Q. Did any pass just after that?

72 A. Well, just after that Linn and I went ashore over to the east side to telephone Mr. Hammond about the accident; so I don't know.

Q. I asked you if there was any tow or boat went up or down the river immediately after this accident?

A. No, sir; I didn't see any. All the whistles I heard that night were the two given by the Victoria and two given by the Pocahontas, and the Victoria blew several whistles. That is all I remember hearing. I do not know anything about the lights on the other scows that were there, except I know the one just over from us, we could see the light on that. It was an anchor light, the same as we had, as an anchor light, high round lights they were; it was something like twenty feet above the boat. The only way I know is the way it hangs in the ways. I have no particular knowledge of the distance. If I am not mistaken, the height of the ways on scow A is about sixty-five feet. The ways is an open pile-way, stairs coming up back of it, and the light hangs on a stanchion that runs off from that, on the west side, in front of the boat. It extended from the side of the scow no great distance; it hung on the outside of a timber that run for the support of the ways, to the top of the ways and comes to the extreme outside of the boat. This light was on the westerly side. I don't know but I think you could see it looking from the east; you could see it from the south.

Q. Was there anything done by anybody on your plant, by either of you three men, other than you have told?

A. No, sir. We did not swing any lanterns, nor we did not make a noise or an alarm.

73 Q. Just tell us what you did do?

A. Why, we didn't think they were going to hit us. Immediately when we thought they were going to hit us we got into the rowboat and got away from there.

Q. So your efforts were directed in getting into the rowboat and getting away?

A. Yes, sir. The rowboat was on the west side of the scow, alongside, and we three men got from the scow into the rowboat and started to row for the west shore. I rowed and I think one sat in the stern and one ahead of me, but we hadn't gotten over one hundred feet, I believe, when the collision happened. We didn't take our lights with us in the rowboat. I went to work at seven o'clock that night. Had been working on that scow possibly six weeks prior to July 19th. The occasion for working at night is, whenever they got rocks they used to work nights because they were in a hurry to finish the hole. The city was very anxious for it. I worked quite a while nights on other occasions on this same scow, but different hole. I had no instructions about what to do with lights, or giving alarms or anything to passing vessels.

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Q. In your experience there did you observe any collisions there that did not do any damage?

A. I didn't see any, not personally.

Q. But do you know there were some?

A. I know that there was some; yes.

Q. Was it a very common occurrence for the tail of those tows to go very close to the boats?

A. I only know a couple of occasions, heard of a couple, in fact.

Mr. KINDLEBERGER: I object to his testifying from hearsay.

74 Q. Well, as a matter of fact, how many times did it go near enough to you that you could have jumped on or off the tow from your scow, in your observation?

A. I never have known them to come as close as that. I never saw them come so close so I could jump on them. I never paid any particular attention to which way the tide set there.

Redirect examination.

By Mr. KINDLEBERGER:

I noticed that the Victoria did nothing to the tow at all from the time she came down to scow C until after the accident.

Q. You were asked whether or not any instructions were given you about lights and so on. Do you know whether or not there was some notice posted up there about lights?

A. Yes, there was a notice in each one of the scows about lights, how high they should be placed.

Mr. VAN ETTEN: I object to it, and ask that the notice be produced if you want to show what notice was there.

The REFEREE: He has not stated the contents of it, but has only stated that there was a notice there.

Q. You were asked about tows going by. Now, do you know about how many tows went by there every day?

A. Why, there was generally a couple of tows up and sometimes one or two down, I think. I did not pay particular attention to that.

75 By Mr. VAN ETTEN:

I saw other boats going up and down at nights, and days, too.

WASHINGTON H. LEROY, sworn for plaintiff, testified:

Direct examination.

By Mr. KINDLEBERGER:

I have been following the river all my lifetime, forty years, boating and fishing. I have done all kinds of boating on the Hudson—canal boating, barge, steam and sloop boating. I came with the Phœnix Construction Company the first season they went to work, 1906, but am not now employed by them. On July 19, 1908, I was night watchman on scow A, the big scow next to scow C, the one

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wrecked. It was almost in the middle of the river where I was, at No. 23.

Q. Now, what lights did you notice on the plants just before the accident happened?

A. All the boats had their lights up.

Q. Describe what lights you saw?

A. A big white light, a regular anchor light, bought purposely for that business and good ones; had them hanging in the rigging, scant twenty feet from the deck, maybe twenty-five feet from the water.

Q. Were they burning that night?

A. Yes, sir, and visible from all sides.

Mr. VAN ETTEN: I move to strike that out. It does not appear that he was on all sides of them.

The REFEREE: I won't strike it out; he can tell where he was.

Mr. VAN ETTEN: I except.

76 (WITNESS:) I saw our own lights. I saw a light on scow B by boring number twenty next to the east, and it was burning all right. On pile driver number one, at boring number twenty-two furthest to the east, I saw a light, and that was burning all right and bright. On scow C I saw half a dozen lights at least; they were lanterns and a big anchor light in her rigging, the same as the rest, and the other lights were on the platform and by the boiler house on the scow. It was a splendid night, couldn't be nicer. Stars were out, and no wind at all; a little ebb tide running—the first of the ebb tide.

Q. What was the first thing you noticed about any of the Cornell boats that night?

A. I see a tow coming up in the Bay, which I always do—I am always looking for them.

Q. How many tows came down there every night?

A. There is three down every night. There is the Newburgh tow, the Albany tow and the Albany ice tow and a Rondout tow, that gets down there in the morning. That makes four tows down; and there is the same number up every day. Once in a while there is a little brick tow, two or three boats, we skip them by the same as steamboats, they don't amount to anything. Twenty odd night boats pass through there every night—Catskill boat, Rondout, Newburgh and Poughkeepsie boats; just as many up as down every night, besides a number of other craft. I went to work there in 1906 and worked to the year 1908. A good many boats have passed there in that time.

Q. How many accidents have you seen happen on any of these scows yourself?

77 A. As a rule we have been clipped quite a number of times.

Q. How many accidents have you seen yourself? I mean about the Cornell boats?

A. There was never anybody else except the time the Poughkeep-

sie hit her, except the Cornell boats. I wasn't there at the accidents of October 28th and 30th.

Q. Now, what whistles did you hear the Victoria blow?

A. She blew two whistles. Then she lay on the end of scow C, to the southwest. The Pocahontas answered her; she was ahead, towing the tow, and the Victoria was her helper, but wasn't attached to the tow. The hawser between the Pocahontas and the leading canal boat was the regular length; I never measured their length, but they are a pretty good length. This tow was made up of canal boats, I don't know exactly how many tiers or how many boats wide, but it was a light tow.

Mr. VAN ETTEN: I ask that the statement that it was a light tow be stricken out.

The REFEREE: Well, there was a number of boats in it.

Q. Did you hear the Pocahontas answer any of the whistles?

A. Only two.

Q. What happened next?

A. She started her wheel and hove over to the eastward, and the Victoria blowed again and she slowed down. She blowed so many whistles it was a hard matter to tell. Then the tow stopped.

Q. What was the direction of the tow?

A. She got more whistles and then she went ahead.

78 Q. How, straight up or down the river?

A. Well, the tug Pocahontas sheered a southwest course, trying to whip around the scow. The canal boats, the tow were swinging down the river like that (ind.), and she came out around this way and tried to whip around, and the tide had them and of course they swung around on to her.

Q. Now you described so that the canal boats were almost across the river?

A. They was quite slanting like that (ind.). When I first saw the Pocahontas and the tow, I think she was going to the westward, to the west of scow C.

Q. When did you notice the sheer that you speak of?

A. She didn't sheer any till the Victoria blew at her. When the Pocahontas swung I saw a change in her lights. She showed her stern lights and port lights, but shut out her starboard lights because she was sheering to the southward. That was after she passed me.

Q. But I mean before she passed you, what lights did you see?

A. Well, she was coming right straight on me first off, when she sheered was after the boat blew at her. I could see the port and starboard lights both, coming right straight at me.

Q. Did you notice any change in the course of the Pocahontas after she answered her whistles? Is that when she changed her course?

A. Yes, sir.

Q. Now, how far away from your scow A did the Pocahontas pass when she went through?

A. She wasn't quite half way in the gap betwixt me and scow C.

79 Q. Then what tier of the canal boats hit the obstruction?

A. Amidships; the starboard side of the starboard scow, about the middle of the tow. I couldn't see what boats hit, I was on the opposite side, but could hear them when they struck. They made quite a noise; there was some confusion around there. The tug blowed for to wake the people up—made a lot of noise. The Victoria at no time had a hold of any of the canal boats, or had any line on to any of them.

Cross-examination.

By Mr. VAN ETTEN:

I am not a licensed man. This was quite a busy channel there; that is, there was a good deal of navigation day and night, mostly night steamboats. Practically all the fleet towing is done by the Cornell Steamboat Company. There is a couple of old O. & W. boats running there, a couple of tugs running up to their coal yards once in a while, and there is other boats goes up and down, but they don't amount to much, oil boats and such as that. The fleet towing is done chiefly by the Cornell Steamboat Company—they control the towing on the Hudson River.

Q. And when you say you had noticed a number of them skipping by, or something like that, a number of times, those tows had rubbed you?

A. Yes, sir. It was not a usual occurrence.

By Mr. KINDLEBERGER:

Q. You were asked about the tows that went by—these Ontario & Western tows—they were pretty long tows sometimes, weren't they?

80 A. They have some awful big barges, and they tow them mean—four or five abreast. The Shamrock Towing Company once in a while tows a schooner through there.

JOHN H. GRIFFITH, sworn for plaintiff, testified:

Direct examination.

By Mr. KINDLEBERGER:

My business is steamboating, but I am doing a little everything. Have been around steamboats fourteen or fifteen years. On July 19, 1908, I was watchman for the Phœnix Construction Company, on boat number one, stationed at boring No. 22, east shore. Am not at present employed by the Phœnix Construction Company.

Q. Now, between half-past nine and ten o'clock on Sunday night, July 19th, what did you do?

A. Well, I made arrangements to meet one of the men on the other side of the river—Breakneck side, which is the east side of

the river, and bring him across in a rowboat. It was a very still, calm night. There was quite a little tide going; no wind at all to amount to anything.

Q. How about the lights, did you notice the lights?

A. Yes, sir. There were anchor lights on each one of the boats, excepting on the scow working, and they had a number of lights over there. They had an anchor light there, and the other lights besides. The other man in this boat going across was Lou Vail; I sat in the stern and he was doing the rowing.

Q. What did you notice when you got half way across the river?

A. When we got over near scow C, one of the Cornell tugs
81 came down; it was the helper the Victoria. She come down around out, and as I was going to go under the stern of this scow he come up and I hollered and asked him where he was going, and he said he was going to show them where the plant was. The tow was quite a ways up the river then, about abreast of Cornwall or Dean's Dock, and was headed pretty straight down the river; I had the idea that she was going to the westward of the plant, she looked to be headed that way. When I got partly over I heard the Victoria blow two whistles, and the Pocohontas answered her. The next I heard whistles blowing some signals that they have—a code between themselves, for slowing down and one thing and another. These were four or five whistles and two or three middling short whistles, some of them were. After the signal whistles were blown I noticed a rank sheer to the eastward by the Pocohontas. When I first saw her she was headed pretty straight down the river, and after the boats signalled each other the tow was headed towards the east; the rear of the tow headed pretty nearly apparently crosswise of the river. After I landed this man on the shore I started back, and then I heard the crash out there. It was pretty dark but I could see the middle of the tow fetch up against our plant. Some of the lights on the platform went out suddenly, and there was quite a noise. Just before that happened I heard the Victoria blow a lot of alarm whistles, before they got on top of them. I should judge about amidships of the tow struck.

By Mr. Van Etten:

During the winter our plants are laid up, and that is why I am not in their employ now.

82 Second Hearing—Feb. 23, 1910.

Mr. Kindleberger: I offer in evidence the original contract between the Board of Water Supply of the City of New York and the American Diamond Drill Co. (Same contract referred to at p. 47 of this case, now marked Plaintiff's Exhibit 4).

Mr. Kindleberger: I also offer in evidence Amendment No. 1 to said contract.

Same admitted and marked Plaintiff's Exhibit 9.

Mr. Kindleberger: I also offer in evidence the second modification of said contract, to go down deeper and at increased compensation for extra depth.

Same admitted and marked Plaintiff's Exhibit 10.

Mr. KINDLEBERGER: I also offer in evidence original assignment, it being understood that a copy may be substituted.

Same admitted and marked Plaintiff's Exhibit No. 11.

Mr. KINDLEBERGER: I offer in evidence the third modification of said contract.

Same admitted and marked Plaintiff's Exhibit 12.

Mr. KINDLEBERGER: I offer in evidence copy of letter dated April 4, 1908, from William E. Swift, Division Engineer, to the defendant.

Mr. VAN ETTEN: Hadn't you better show that we received
83 it? I haven't any such letter. Put it in now and I will find out whether we ever got it. I do not object if we ever got the letter.

The REFEREE: Let it go in now, and you can look it up and reserve your right to object to it if you didn't receive it.

Same marked Plaintiff's Exhibit 13.

Mr. KINDLEBERGER: I also offer in evidence a letter dated July 18th, 1908, purporting to be signed by William E. Swift, Division Engineer, and addressed to the defendant at *their* New York office.

Same admitted, marked Plaintiff's Exhibit No. 14.

GEORGE H. HAMMOND recalled:

Direct examination.

By Mr. KINDLEBERGER:

Q. Mr. Hammond, at page 35 of the minutes on your direct examination, you testified that if you remembered correctly, hole 21 at the time of the accident was down 489 feet. Do you wish to correct that testimony?

A. Yes, I think it was 479.7 feet, I believe.

By the REFEREE:

Q. You have refreshed your recollection about it since the last hearing?

A. Looked up the report; yes, sir.

By Mr. VAN ETTEN:

Q. Are you testifying from actual knowledge, or from a report?

A. From a report.

Mr. VAN ETTEN: Then I object to it.

84 By Mr. KINDLEBERGER:

Q. You measured each part of the hole that went down?

A. Yes, sir; but not since I testified before. Originally, I measured the pipe as it went down. I signed the reports.

Q. And you knew they were correct when you made them?

A. Yes, sir. I had the depth confused with a later date of that hole. I was on the ground at the time, all the time. I measured the pipes as they were put together.

Q. Now on page 40 of your examination it appears that you testi-

fied that it took three or four weeks after the accident to get the hole in condition again to work. Do you wish to modify that testimony?

A. I find by looking up the report that it took us longer than that. It took till September 25th—or 24th. I have been able to refresh my recollection that we started work again on that pipe on the 25th of September, 1908. I was in error about three weeks.

Q. Now on page 49 of your testimony you stated that the Merritt & Chapman Wrecking plant came there the second day after the accident. Do you wish to correct your testimony as to that?

A. Yes, sir; it came there, I think, eight, nine or ten days after. They arrived on the 27th of July.

Q. I show you a paper and ask you if you will state where you obtained that paper?

A. This is a paper that was sent up from the New York
85 office. There was one like it tacked up on each boat, inside of the house, for the watchman. That notice was put up by my orders, and every boat had one on.

Mr. KINDLEBERGER: I offer it in evidence.

Mr. VAN ETTEN: I object to it.

By the REFEREE:

Q. Do you know it was there on the day of the accident?

A. Yes, sir.

The REFEREE: I will let it go in.

Mr. VAN ETTEN: How can it affect us?

The REFEREE: It doesn't affect you, except it was some notice about the lights. It would not prove that the lights were there, but it would tend to show that it was their duty to put them up, and that in connection with their testimony that they were there I think is material.

Mr. VAN ETTEN: Exception.

Same admitted, marked Plaintiff's Exhibit 15.

By Mr. KINDLEBERGER:

Q. Can you state to the Court whether you had occasion frequently to examine the anchor lights that were put on these boats?

A. I often used to see them in the evening from the shore, also going across the river, or if I visited the boat, or from as far south as Cold Spring or the upper side of West Point. They were round globe six inches in diameter, 5½ inches long, made of corrugated glass to concentrate the rays around; they were in a big iron frame about a foot and a half long. They were called anchor
86 light No. 22. As to the distance I observed them from the plant, I have seen them as far as West Point, which, I think, is two and maybe three miles. I bought these lights, two in New York, and one I sent an assistant to Newburgh to buy.

Q. (Showing paper.) Are you able by looking at this paper to state when scow C was put at boring No. 21?

A. Well, this doesn't say the name of the scow, but this is the date we changed scow C, on June 19th.

The REFEREE: Will there be any dispute but what she was there on the night of the accident.

Mr. VAN ETTEN: No; but it is a question how long she had been there.

Mr. KINDLEBERGER: I offer the paper in evidence. It is a bill for the services of the tug in shifting the location of that scow.

Mr. VAN ETTEN: There is no objection to the bill going in, but I don't concede it was for that shifting. I don't know what it was for.

On the 19th of June, 1908, we took scow C from a job and replaced scow A with scow C; transferred the anchor lines from A to C, and started drilling, and took A to equip her for hole No. 23. Scow A had been at hole 21 all season up until the 19th of June, and then we brought drill-boat scow C there. That is the way we made the transfer, but I couldn't say positively the date. The steamtug Rose, a Cornell Steamboat Company tug, did that work, I think. They did all our work, with two or three exceptions.

87 Mr. KINDLEBERGER: Now I offer it in evidence again.

Mr. VAN ETTEN: If we concede you changed her on the 19th, what's the use of putting the bill in?

Mr. KINDLEBERGER: I want to show it was done by your company.

The REFEREE: I don't see how that is material. He says the Cornell Steamboat Company made the change.

Mr. KINDLEBERGER: Well, if it is not disputed then I will not put the bill in.

Mr. VAN ETTEN: No.

The REFEREE: If they bring a witness to dispute it, then you may cross-examine about it and put it in.

The WITNESS: After the accident the Merritt & Chapman derrick was up there. They pulled the pipes out for us, sent a diver down and hitched on the pipes and pulled them out and put them aboard their boat—all that wasn't broke, and took them ashore to Storm King and put them on the dock, and then they were through and come down.

Mr. KINDLEBERGER: I offer in evidence the receipted bill of the Merritt & Chapman Wrecking Company.

Mr. VAN ETTEN: I object to it.

The REFEREE: You may show, if it goes to the question of damages—any expense that you incurred.

88 Mr. KINDLEBERGER: That is what I offer it for. We have the bills here. I am asking Mr. Hammond if the work was done, and then I shall show by Mr. Belknap that the bills were paid.

Mr. VAN ETTEN: I will object to the proof of damage in that way. I think you ought to show what was done.

Mr. KINDLEBERGER: You do not object that it is offered without proof by Mr. Belknap?

Mr. VAN ETTEN: No; on the ground you must show what was done, and you cannot show it by producing a bill.

Q. Do you know how many days the Merritt & Chapman Company was up there? Is there anything that will refresh your recollection?

A. (Referring.) That bill doesn't do me any good. I think they arrived there on the 26th sometime in the night and they stayed there until the evening of the 29th and left in the south bound tow on the 29th. They were up there two days working, the 27th and 28th. During the time they were towing from New York I don't know what time they left or what time they arrived back. They finished up in the evening of the 29th and notified the tow, and they came down in the Cornell's south bound tow, I think.

Q. Do you remember whether there was a skiff of the Phœnix Construction Company damaged in any way?

A. There was a skiff mashed there. The boat mashed it. I didn't see what happened to it, but during the collision it was mashed. I bought it for twenty-five dollars. Scow C had
89 some timbers or plank broken, and she was sent to Marvel's dry dock and repaired.

Mr. KINDLEBERGER: I offer in evidence the repair bill of Marvel.

Mr. VAN ETTEN: We will not dispute any bill he has charged, if it is properly related to this scow.

Same admitted and marked Plaintiff's Exhibit 16.

(Witness examining bill.) This is the bill relating to scow C, for repairing the damage that was done to her by this collision.

Q. Do you know whether as a result of this accident any towing charges were incurred, and if so just state generally what they were?

A. We had the Cornell Company towing there two or three days after the wreck, back and forth to the wreck, towing scow C and piledriver No. 1.

By the REFEREE:

Q. What do you mean by the Cornell tow? a tugboat?

A. Had a tugboat from there, their Newburgh office, and had a tow bill for towing scow C up to Marvel's yard and back. We towed there two or three days, I think. On the morning after the wreck there were two boats there, one we had and one the representative of the Cornell Company brought down,—I don't know whether they charged that to us or not—met him at the Cornwall landing and brought him out.

Q. (Showing witness.) Look at the papers and state what
90 each of those items represents, if you know, and what work was done in relation to them and in relation to this accident?

A. July 24, bill of $6.00 for towing—I don't know just what they towed down, but it was down there for the wreck, because we were not moving any other boats at that time. Here is one bill for placing Merritt & Chapman's wrecking derrick Century. I would say all of those bills belonged to the wreck.

Mr. KINDLEBERGER: Now I offer them in evidence.

Mr. VAN ETTEN: They are objected to.

The REFEREE: Do you say they were not bills incurred as a result of this accident?

Mr. VAN ETTEN: I don't know.

The REFEREE: The witness says they are. I do not think the fact that they have not been paid is sufficient to exclude them, if the Phœnix Company is liable to pay them.

Mr. KINDLEBERGER: The fact that we offer them admits the liability.

The REFEREE: If they were compelled to hire a tug, I suppose they would be liable for the *the* amount.

Mr. VAN ETTEN: I haven't any means of saying they were not incurred in that connection.

The REFEREE: The witness says they were. I will admit them.

Mr. VAN ETTEN: Exception.

Said bills (8 in number) marked collectively as Plaintiff's Exhibit 17.

91 Pile-driver No. 1, belonging to our company, went to work saving the pipe of hole 21 on Monday morning, July 20th, the day after the accident, and worked until September 24th, 1908, excluding Sundays, entirely on the job of clearing up No. 21, the 20th of July and the 24th of September included. The launch of the Phœnix Construction Company was also at work, doing that part of the work for each crew, running errands or doing any little towing we needed, and that was used constantly from July 20th. The launch was working for three other boats besides that. She was tender for the whole of the three boats of the fleet that we had there. One diamond was lost. I think it was a karat and a half; it was turned into the office. There were three fluke anchors, weighing about a thousand pounds each, lost.

Q. I will ask you simply whether some of this drive pipe was not lost?

A. It was destroyed. Not so much lost as bent so it could not be used any more. I haven't a memorandum with me of how much pipe was lost. Speaking generally, wrenches, three anchors, three anchor lines, skiff and a diamond were lost.

Q. How about the driving platform?

A. That was mashed and destroyed so we had to saw it apart to get the drill off. There was a diver at work there several days.

Cross-examination.

By Mr. VAN ETTEN:

Q. Did you have a white light and flag on the scow at the right hand side of the channel looking down-stream?

92 A. We didn't have any between hole 21 and the west shore. We did not have a red light or flag on the left side of the channel looking downstream. We had no flags at all.

Q. Did you understand that the permit from the War Department was that if the scow or boat is on the right side of the channel looking downstream, there should be a white light or flag at each

end, and if on the left hand side of the channel looking down-stream a red light or flag, the flags to be three feet square?

A. That was in 1907, yes, sir. But it was changed in 1908 to all white.

Q. Where were your signals changed? Show me the instructions or letter that changed that, will you?

A. I haven't any letters.

Q. Who changed it, then? Did you change it?

A. No, it was changed by the Pilot Department or the Inspector of Pilots here in New York Harbor.

Q. Did you comply with those requirements at the time of this collision in 1908, which I have read to you?

A. White lights? Yes, sir.

Q. White light on the right hand side of the channel and red light on the other side?

A. We didn't have any red light. We did not comply with the requirement you read to me, of course.

Q. How many times in your recollection was this plant at 21 changed, from the Spring of 1907 until the time of the first collision in July, 1908?

A. 1907, I think it was in September, we started with boring, and the boat lay there till fall. We came down the river in the
93 Spring and she went back and wasn't changed until the 19th of June, till we took scow A away and put scow C there.

Q. Do you know there was a plant near there started May 8th, 1907, and abandoned May 18th, 1907?

A. No, sir. That was forty feet to the west. I know that was there. There was only one obstruction there.

Q. Do you know that was changed on May 19, 1907, to a point easterly and occupied that until August 29, 1907?

A. Yes, about forty feet east, I think it was moved.

Q. And then on September 3rd you started this hole 21, and that was still further east of it?

A. That is the one that I mean, forty feet east of the old original hole 18.

Q. I show you a blue print which seems to have been made by the Board of Water Supply, and which I will ask to have marked for identification, and ask you if you recall those three plants along there?

A. (Referring.) There was 18, a hole started there——

By the REFEREE:

I recall those changes. They are all right. Those changes were made.

Blue Print marked Defendant's Exhibit D-2 for Identification.

By Mr. VAN ETTEN:

Q. And are you able to say that the map shows all the other changes that were made at that point, across the river there?
94 A. Well, these were not all here at the same time. Those two, 16 and 19, were not there.

By the REFEREE:

These endorsements here with reference to those holes are correct. I think the dates are correct.

By Mr. VAN ETTEN:

Q. So as matter of fact the plants between Breakneck and Storm King were continually shifted, they did not remain stationary, did they?

A. They were not continuously stationary.

Q. They were not a permanent fixture, any one of them?

A. Any one of the deep ones was a permanent fixture for two years.

Q. But the various plants, or whatever you may call them, put there by your company, were changed? They did not stay stationary?

A. I think four obstructions at one time was the most we ever had there. Those four did not stay all in one place all of the time, for after the hole was finished that was all there was of that.

Q. In other words you were making test borings at various points between those two shores, is that right?

A. We made borings there at six or seven points, and when we made a boring to a certain limit or extent then we shifted our machine somewhere else.

By Mr. KINDLEBERGER:

Q. When you had finished with a certain boring do I understand that you then removed the pipe?

A. Yes, sir; and then put new pipe down some other place, or used the same pipe over again.

95 FRANCIS BELKNAP, recalled for plaintiff, testified:

Direct examination.

By Mr. KINDLEBERGER:

Q. At page 14 of your testimony you stated that you ran the 15-inch pipe down to a depth of about 225 or 230 feet. Do you wish to modify that statement?

A. I find on reading over the testimony that I had confused 21 with 23, and that all the depths that I gave for 21 are inaccurate as regards the different sizes of pipe.

By the REFEREE:

Q. You have no personal knowledge about it anyway, have you?

A. I have only reports that were sent to me. I didn't measure them.

By Mr. KINDLEBERGER:

Q. On page 24 you testified about the time you put hole 23, occupied by a scow, was the first of June, 1908. Do you wish to modify that statement?

A. I find in looking over the records that we were awarded the

order about the first of June, and that we did not locate the scow at hole 23 until the middle of July, a very few days before the accident. The exact date of locating the scow was the 16th of July, and the accident was on the 19th of July. There hadn't been any boat there before that; that was the first time we occupied that location.

Q. (Showing papers.) Now did you receive these two pieces of paper which I now show you, through the mails?

96 A. Yes, sir; these bills all came to me for approval before payment.

It is conceded that the tug Fields of the Cornell Steamboat Company located, on the 16th and 17th days of July, 1908, scow A at hole 23.

Q. Now, I show you this piece of paper and ask you if you received that paper through the mails?

A. Yes, sir. Our company paid the Merritt & Chapman Derrick & Wrecking Company the amount of that bill.

Mr. KINDLEBERGER: I offer it in evidence.

Mr. VAN ETTEN: I object to it.

The REFEREE: You will have to prove the reasonable charge for the service.

The WITNESS: I can testify that it is a reasonable charge. We got especial prices from them as a rule. We employed them a good deal.

By the REFEREE: I am familiar with the charges paid for that kind of work. I have paid a great many of them, for a period of seven years before the accident, and I am familiar with the charges for this sort of service. That is a reasonable charge.

The REFEREE: I will admit it.

Mr. VAN ETTEN: I except.

Said paper marked Plaintiff's Exhibit No. 18.

By Mr. KINDLEBERGER:

Q. Now, did you write any letters to the Department of Commerce & Labor?

97 A. I wrote to Captain Harris, the Towing Supervising Inspector for this district. I am familiar with the fair rental value of a piledriver such as those owned by us. I had to hire piledrivers once.

Q. I see that in your claim you claim $1.50 a day for services of a launch. Explain how you got at that figure?

A. Our expenses including the labor of a runner, the launch, is $150 a month, and we had four scows at that time. There were three holes in operation and one being cleared up. $150 a month is $6 per working day and that divided by four makes $1.50 a day charged for the launch.

CHARLES B. GALVIN, sworn for plaintiff, testified:

Direct examination.

By Mr. KINDLEBERGER:

I am employed by the Board of Water Supply at present as Assistant Engineer. I have no college education in engineering, but I have studied mathematics enough to carry on my work. I am connected with the Board of Water Supply. I have passed an examination.

Q. What are your duties around Storm King and Breakneck Mountain?

A. My duties at the time of that accident and previous were those of instrument man in a field party; at times I was in charge of the party, and at times there was another man over it, and in the course of my work I had occasion to triangulate the positions of the various borings where the work was being carried on by the Phœnix Construction Company. I personally triangulated the positions
98 of borings No. 21 and 23; that is I did field work on them. I turned the angles which furnished the necessary data to locate hole 21 on December 24, 1907. I also did the instrument work that located the scow the morning after the accident, on July 20th.

Q. And hole 23, when did you locate that, about?

A. I can't say right off now, I would have to refer to the notes I made at that time. (Referring.) On July 20, 1908, I turned the angles of hole 23 from both ends of a base line.

Q. Now as the result of your calculations, how far are you able to state hole 23 was from any object?

A. Well, regarding hole 23, I haven't had any chance to go through these figures here to reduce them to their position on the map. There are some stadia readings here that I can verify.

Q. As I understand it, in making your triangulations you used as a base a little point shown in a circle below the line?

A. That is one end of the line, and the other end is down the river about 1100 feet. I have made my triangulations from that little circle there (ind.) marked 2 A on Plaintiff's Exhibit 6. Hole 23 was 1354 feet from the base line, 2-A.

By the REFEREE: Twenty-one is 755 feet from this circle here on the west shore.

Q. And that circle is how far?

A. The scale is 100 feet to the inch, (scaling) 37 feet that is, so it would be 755 feet minus 37 feet, or 718 feet.

Q. Now where is 23 from the shore?

By Mr. KINDLEBERGER:

Q. Or from that datum point?

99 A. Stadia reading was taken 1,354 feet. I took that reading. Our location as plotted there, does not depend altogether on the reading. It is approximately correct—599 feet. Borings 21 and 23 are about 599 feet apart according to my calculation. From

22 to 20 is 457 feet, and from 20 to 21 is 841 feet. Deducting the distance 599 from 841 you will get the distance between 23 and 20—242 feet.

Q. Now I show you Plaintiff's Exhibit 6, and ask you if that is substantially accurate representation of the distances between those points that you have testified to?

A. Yes. I have scaled them and it is.

Cross-examination.

By Mr. VAN ETTEN:

Q. Does that show all of the plant that was there as it existed on July 19, 1908?

A. I could not say as to that.

Q. You- map was made for the purpose of showing the location of 20, 21 and 23 without particular reference to the number that were there?

A. I am sure that that map would show all obstructions or scows that were on there at the time the map was dated.

Q. That was the 21st. You are employed by the Board of Water Supply you say?

A. Yes, sir, on Northern Aqueduct, under Mr. William E. Swift, Divis-on Engineer, Hudson River Division, at Cornwall. He is under Mr. Robert Ridgway, at Poughkeepsie, and there is a Chief Engineer of Water Supply that Mr. Ridgeway is under. I got my orders to do this directly from Mr. West, an assistant engi-
100 neer, under whom I was serving; he was one of Mr. Swift's assistants.

Q. Had you done anything on this prior to that in locating these, other than you have testified to?

A. Yes, from time to time I have located other holes there. I have no recollection as to who located the placing of 20 there.

After a plant was placed there we took our observations before and after it was placed there. We first determined where the hole was wanted and set ranges accordingly so that the scow would be set in that position, and then checked the location.

Q. And so far as you know the orders to do that came from Mr. West?

A. Well, Mr. Swift would, perhaps, be more strictly correct, but directly the orders came from Mr. West to me. I know the depth of water through there; it is about 85 feet at 21.

Q. Do you know whereabouts it begins to be 25 feet from the west shore, how far out?

A. Except as shown by the contours there—I have worked at the soundings. I haven't any off-hand recollection about it.

By Mr. KINDLEBERGER:

Q. That is the contours in Plaintiff's Exhibit 6?

A. Yes, sir. So far as I can judge from recollection those contours look reasonable. I know the depth of water increases rapidly there—steep slopes.

By Mr. VAN ETTEN:

Q. Well, how far from the shore would you say that 25 feet of water began? Not exactly, but about how far?

101 A. (Scaling.) It is ⅜ of an inch, and that would be from 37 to 40 feet.

By Mr. KINDLEBERGER:

Q. I forgot to ask you, did you have anything to do with locating the position of the scow after the accident?

A. Yes, sir; I measured the angle to two corners of that and went over the computation this morning and found it correct.

Q. How far, speaking roughly, was it from its former position, if you are able to state, by scaling from the map?

A. (Scaling.) 50 feet, due south.

WALTER T. MCINTOSH, sworn for plaintiff, testified:

Direct examination.

By Mr. KINDLEBERGER:

I am employed by the Board of Water Supply of the City of New York, and was the inspector at hole 21 during the first year that it was there, in 1907. My duties ceased at that hole about December 24th, 1907.

Q. Are you able to state from any memorandum you made, or otherwise, what was the composition of that hole at the time you left?

A. I could by referring to the original notes made at that time.

By Mr. VAN ETTEN: The notes were made by me during the summer of 1907.

By Mr. KINDLEBERGER (referring): The depths to which

102 each casing was sunk are 15-inch casing, 152.7 feet; 12-inch casing, 207.4 feet——

By the REFEREE:

Q. Is this from the surface?

A. That is from the point which was given in the contract with the Phoenix Construction Company, two feet above mean high water mark at Sandy Hook.

By Mr. KINDLEBERGER: 10-inch casing 282.4 feet; 8-inch casing 406.9 feet; 6-inch casing 471.4 feet; that is all the casing that was in in 1907. I had nothing to do with what was done in 1908.

Cross-examination.

By Mr. VAN ETTEN:

Q. Were those left in there during the Winter, do you know?

A. No, they were not.

Q. So that in the Fall those were all taken out?

A. In December—they were not all taken out.

Q. Do you know what ones were taken out and what ones were not?

A. My recollection is that I didn't see all those taken out.

WILLIAM B. HOKE, sworn for plaintiff.

Direct examination.

By Mr. KINDLEBERGER:

I am employed by the Board of Water Supply of the City of New York as Assistant Engineer, and was so employed in the Spring of 1908 at Breakneck and Storm King Mountains. I was in-
103 spector of borings from the time the work started in 1908, until the last of July.

Q. Have you any memorandum with you which will enable you to testify as to the depth of the casing on boring No. 21 in 1908?

A. I have a record book.

Q. Will you please refer to it and state how far down the casing was and what was the character of it?

A. At the start of the work we accepted the depths which had been given in the previous year—that is, 6-inch casing 471.4 feet, 8-inch casing 406.9 feet. The 4-inch casing was put in and put down to a depth of 474.5 ft., and the 2½ in. casing was put in to a depth of 478.7 feet. After that then a diamond drill was working and produced the hole to 479.7 feet. That was the reported depth of the hole at the time of the accident, July 19, 1908.

Q. Do you know how much below the surface of the water the casing was when the work was started in 1908?

A. I do not recall from memory, but there was a print supplied me by the Board of Water Supply showing the depth of casing below the surface.

Q. Can you refresh your recollection from anything and testify as to hole 21?

A. (Referring.) The top of 6 inch casing given on this drawing is 69 feet; the top of 12 inch casing is 69.5 feet. 69 feet was the highest casing. That is nearer the surface of the water. During the winter of 1907 and 1908 the casing was at that depth below the surface of the water.

By Mr. VAN ETTEN:

Q. Do you know what they were boring through there?

104 A. The information that we got from the diamond drill boring at the time they were working there, was not of any conclusive nature.

Q. Do you know whether in the spring this hole was filled up—these casings were they filled in the spring with gravel and sand and such things?

A. They were to the extent probably of 40 feet from the bottom. That was pumped out.

HEARING RESUMED—MARCH 4, 1910.

IRA HARRIS, sworn for plaintiff, testified:

Direct examination.

By Mr. KINDLEBERGER:

I am United States Supervising Inspector of Steamboats, Second District, and have been for a little more than five years. The Hudson River is in that District.

Mr. KINDLEBERGER: I offer in evidence a letter from Captain Harris, or a notice, dated March 26, 1908.

Same admitted, marked Plaintiff's Exhibit 19.

I caused this letter to be sent to the Cornell Steamboat Company, among others. I also caused another letter to be sent out by the local inspectors later on, there was one before that and one after it.

Q. (Exhibiting letter.) Is this a copy of the letter which you sent out?

A. It is.

Mr. KINDLEBERGER: I offer it in evidence.

Same admitted and marked Plaintiff's Exhibit No. 20.

105 Q. (Exhibiting another letter.) Did you cause this letter to be sent out by the local inspectors?

A. Yes, sir.

Mr. KINDLEBERGER: I offer it in evidence.

Same admitted, marked Plaintiff's Exhibit 21.

Q. Did you have any conversation, without stating it, with Col. Knights of the Engineering Corps, about the lights that were to be put on these scows?

A. I did, when we originally fixed these lights; I did not in 1908. I think it was 1906 that Col. Knights and myself agreed on these lights, I am not so sure about the dates. I believe three times we have issued regulations or notices concerning those same lights, and at the original time it was after conference with Col. Knights; whether he called on me or I on him—there were several calls, I think, probable.

Q. (Exhibiting paper.) I show you this piece of paper and ask if that refreshes your recollection?

A. No, I cannot say that it does. It is signed by the local inspectors, not by me, and I don't remember that.

Q. What regulations did you promulgate about lights on these scows?

A. White lights, and just the same as have been used on——

Mr. VAN ETTEN: I think I will object to that; the regulations themselves are the best evidence of what that was.

Q. Well, what did you determine about flags at these points?

Mr. VAN ETTEN: I think that immaterial, unless it was promulgated.

106 The REFEREE: Yes, you will have to bring it to the notice of the other side.

The WITNESS: If it be proper, I will say that there was no law and no rule as to what should be the signals to guard such work. Where the work is done under the direction of the officers of the Engineering Corps of the Army they are authorized to make or determine those lights, and when their order is approved by the Secretary of War it becomes the law. I have been consulted as to the character of lights for special purposes, by the engineering officers in charge of such work, a number of times, and two of those cases, on the Delaware, were about the same time as this was, and as to the exact conversations I cannot remember, they were with Major Sanford. As Chairman of the Committee on Pilot Rules I have offered a resolution which had been approved, determining and fixing those lights for similar purposes and making them uniform all over the country.

Cross-examination.

By Mr. VAN ETTEN:

Q. Do you know that the permit from the War Department was that the scow or boat on the right hand side of the channel looking down stream, there should be a white light or flag at each end, and on the left hand side of the channel looking down stream, a red light or flag—the flags to be three feet square? Do you know that such instructions were issued by the War Department in 1907?

A. No, sir. I do not say that it was not. I do not know that it was, that is all.

107 It is stipulated that the following be deemed a part of the damages of the plaintiff, if damages should be awarded herein, without further proof as to the details thereof:

One skiff, $15; diamond, lost, $112.50; Coal, $25.84; Coal, $22.20; one swivel, $14.17; one swivel head and safety clamp repaired, $43.32; two pairs tongs, $12; safety clamps, $12.96; hose, $2.50; rope, 9.46; trucking on diving apparatus, $3.16; trucking on diving apparatus, $2; trucking on diving apparatus, $2.30; carfare, diver, $7; telephone, $9.40; wrenches, $3.75; chains for wrenches, $5.40; drive pipe lost, $199.37.

GEORGE A. HAMMOND, recalled for plaintiff, testified:

Direct examination.

By Mr. KINDLEBERGER:

Q. With reference to the anchors lost, how many were lost, do you know?

A. Three mushroom anchors, 1,000 lbs. each. They are less expensive than fluke anchors. I was wrong when I testified at the last hearing that they were fluke anchors. The second time it was that flukes were drawn. We had mushroom anchors the first time and flukes the second time. (Looking at paper.) This refreshes

my recollection as to what those anchors were and how much they were worth. I see we had one here 974 lbs., one 988 lbs., and one 977 lbs. They are the ones that were missing, all mushroom anchors. That makes them a little less than 1,000 lbs. each. Their value per lb. is four cents on the bill here. As far as I know I think that was a fair value, but I am not an expert on values.

108 These are the three anchors that were lost in this collision. The cables were broken and they were sunk in the mud. We tried to recover them. Three cables were broken; one on each anchor.

It is conceded that the value of the three anchors testified to by the witness is $117.56.

Q. Now as to the wire cables. How many wire cables were lost?

A. Three. There was probably 30 feet left on the boat, so they were useless. There wsere three cables supposed to be 500 feet galvanized wire cables, about three-quarters of an inch in diameter.

Q. Where were they purchased? (Examining paper.) Will this refresh your recollection?

A. Yes, this bill calls for 1500 feet, so I am short 100 feet on those. Those are the cables that were bought the previous year, in 1907, and are the ones that were lost. I don't know what those cables cost; that was taken care of by the New York office.

It is conceded that the three cables in question cost $142.50 in May, 1907.

Q. What was the condition of those cables in 1908?

A. All right, very good. They had stood all sorts of blows there, and they were just the same as new ones, for our purposes.

Q. What happened to this driving platform?

A. The driving platform was mashed up, and we had another one made in Cornwall at the Haff-Howell Company. The platform and frame that the drill set on cost about $51 or $52. I O. K.'d

109 that bill and it was paid from the New York office. I know the work was done.

Q. (Showing paper.) Will this refresh your recollection as to what you paid for the platform?

A. Well, this is the voucher for the platform that was lost.

Q. Can you refresh you recollection and state just what was paid for that platform?

A. We paid $45.95 for the platform, and yellow pine for the frame was $2.39, and 1¼ hours' work on it at 45 cents, was 56 cents, and 24 bolts, $2.40, amounting to $51.30. That bill was June 11, 1907, built out of yellow pine.

Q. What was done with it during the winter?

A. Put it in the boats and brought it down. We replaced the platform that was destroyed by another one; that was made about the same thing, and at the same place. It cost about the same, I imagine; I don't know just what the second one did cost. I think we used spruce in the second one instead of yellow pine.

It is stipulated that the diving dress was bought for the use of the diver and used by him in this work, and that said suit cost $32.

By Mr. KINDLEBERGER:

Q. Do you know what condition the diver's suit was in when the work was over of clearing up this accident?

A. I don't think it was torn or anything, but just ordinary wear.

By the REFEREE:

To tell how long it had been used I would have to look at the reports, but I suppose ten days or whatever it took him. I don't know exactly, but somewhere along there. It was used
110 during the wreck there, and the report would show the number of days they used it.

By Mr. KINDLEBERGER:

The depth of the water there we figured it 93 feet, but the engineers, I think, called it something like 88 feet. I know it was so deep that he couldn't stay down very long.

Q. In paying the wages of the men after this accident did you keep separate track of the wages?

A. The time-keeper did, under my direction. He made out the time and give me the amount that was due; he made out the envelopes and I took the money and counted it for the envelopes and he checked it, and we put it in the envelopes and then we went around the boats; sometimes I saw him pay it and sometimes I didn't. I am pretty sure it was all paid, or I would have heard of it. I looked over the list always, and I knew the men on the list had worked on that particular job. I directed a separate account kept of the work on this hole, cleaning up of this accident.

Q. (Exhibiting paper.) Now I show you this paper, and ask you if that was a separate account of the work done on account of the accident from July 20, 1908, to and including Saturday, August 1, 1908?

A. Yes, sir; those other men were working on the boat, and those are the dates, and that is the original, I should say. That represents the work done only on that boat. It is so headed.

Q. I see there is a charge there for the apportionment of the time of Hammond and Fraley, what do you mean by that?

111 A. We were at the four boats working at that time, and one-fourth of our expenses was charged up to each hole; it was divided by the number of crews and boats we had working, so it was apportioned in that way.

Mr. KINDLEBERGER: I offer that payroll in evidence.

By Mr. VAN ETTEN:

Q. Why have you got drillers on here?

A. That was a drilling job, the way I understood it. We were drilling.

Q. They were not drilling anything if they were trying to find something?

A. Well, we couldn't discharge the drill men while we were looking for that pipe. We had the crew there, and if it hadn't been for you people we would have been drilling. Those men, when they started to clean up the wreck, were kept on the gang we had working on the boat; we kept the same crew right on and cleaned it up.

By the REFEREE:

Q. And you paid them at the same rate of wages?

A. Yes, sir; the same rate that we paid them before and after. Some of them we hired by the month and some by the day; had some men there at $175 a month, some $125 and some $2.50 a day.

By Mr. VAN ETTEN:

We paid every two weeks.

Q. But you paid so much per day? You did not pay so much per day at the rate of so much per month?

A. Yes, sir; we paid at the rate of twenty-six or twenty-
112 seven days; when our men worked Sundays they got extra pay for it.

Mr. VAN ETTEN: By not objecting to this paper I do not want to be understood as conceding it.

The REFEREE: I will take it for what it is worth.

Marked Plaintiff's Exhibit 22.

Mr. KINDLEBERGER: For the purpose of shortening it I will state that the exhibit contains a charge for three drillers' time during that period of $80.40, 62.40, 33.60, respectively, and for laborers and watchmen, a total, including drillers, $344.90; small disbursements $15.69, and one-fourth of the salary of Mr. Hammond and Fraley, the superintendent and assistant superintendent on the job, making a total of $560.59.

By Mr. KINDLEBERGER:

I have done work in this particular line for over 20 years, and such work as was done there could not be done by ordinary laborers. On the job we had expert men in the drill line who had been with me off and on for 12 or 14 years all over the country.

Q. You require some skill in doing that kind of work? I mean the work that was actually done in cleaning up this wreck?

A. The men was on the hole as it was going down, they knew the position it was in and they knew just how to take it up, and when the thing came up they knew just where they were and all about it.

Q. The period from August 3 to August 15, 1908, can you state how much wages were spent on this hole by reason of this acci-
dent?

113 A. Well, there is $76 on this payroll, and that was done at the time the payroll was made out, when everything was fresh in mind. I didn't do it; the assistant did it. It was submitted to me for approval at that time; we went over the accounts always, day by day, and distributed everything just as honestly as we possibly could.

Q. Now the period between August 17 and August 29, can you state how much was spent for labor at that time?

A. Well, this was 202.67; those are the watchmen and the men that were working there.

Mr. KINDLEBERGER: I offer it in evidence.

Mr. VAN ETTEN: I do not want to be considered as conceding its correctness.

Same admitted, marked Plaintiff's Exhibit 23.

Mr. KINDLEBERGER: In substance the exhibit is as follows: Two drillers, $6.90, $34.20 respectively, and other laborers, with the drillers, totalling $148.85; small disbursements amounting to $3.82 and proportion of time of Hammond, superintendent, $50, making a total of $202.67.

I also offer in evidence this payroll from Sunday, August 30, to Saturday September 12, showing two drillers, $43.20, and $20.10; other laborers, together with drillers, totalling $212.06; board for diver and tender and other miscellaneous, $6.40; proportion of time of Hammond and Fraley, $64; making a total of $262.46.

Same admitted and marked Plaintiff's Exhibit 24.

Mr. KINDLEBERGER: I also offer in evidence another cov-
114 ering the period from September 14 to September 26, inclusive, covering wages of one driller, $16.20, and other laborers, aggregating with the driller, $50.70, and a proportionate share of the expense of Hammond and Fraley, $32, making altogether $82.70.

Same admitted and marked "Plaintiff's Exhibit 25."

Q. I see there is a charge here of $4.60 for driver and tender? What was that?

A. That was their traveling expenses from New York up. Fraley paid it and I reimbursed him. I know it was paid.

Q. Here is an item of October 20, for the use of a crew and pile driver, and launch and superintendent for one day, $30.90. Will you explain how that was made up and why you charged that?

A. Well, after we resumed drilling, we pulled the diamond out and we charged a day fishing for the diamond, because the hole was in good condition before we started and the bottom of the hole was put in such bad shape by the wreck that we considered that belonged to the wreck. We started on the hole again in September, but had hard work to get back down again. We had shot and broken bottom and we worked probably six weeks to get down through this place, and after the wreck we had to pull that pipe out, and that left the bottom in the same condition it was before. We stopped our regular work one day looking for the diamond, and we charged that day up for what it was worth, $30.90.

115 Cross-examination.

By Mr. VAN ETTEN:

I was the superintendent in charge of the work in the river. I would have been there and paid whether there was a wreck there or not. I was paid a monthly salary in the line of my employment,

and my assistant also. There was no increase in our bills or salary for services or compensation because of this wreck, but in order to apportion the thing we split it up. These drillers were employed by the month and were paid just the same whether they worked or not. If a man was away on his own pleasure he didn't get paid, but if he was on the job and the wind blowed so hard that we couldn't work he was paid just the same. If a man showed up in the morning and we couldn't find any work for him to do we paid him just the same—but we always found something for him to do.

By the REFEREE:

If he was there ready to work then he was paid. If anything happened that we couldn't work, the wind blowing or anything, then he would do some other work on the boat. He was paid for every day he was on the work.

By Mr. VAN ETTEN:

Q. What work did these drillers do in clearing up the wreck?
A. They run the engine.
Q. Didn't you say there was a crew there?
A. About three men besides the drill men, I think.
Q. You mean to say you increased the crew from six so
116 as to have about twelve men in a crew?
A. No, there must have been double shifts there, the men are not all full time on there. We may have shifted men around—wanted them somewhere else. They might not be able to do work that was satisfactory to us.
Q. You have twelve men here on this payroll. Now where did these men all come from?
A. They came from somewhere else, on other jobs, they were shifted. They were men that were working on the other work; we shifted them. They are not all full time.
Q. These drillers could have been used on the other plants there, couldn't they?
A. We had two drillers on each boat when drilling rock.
Q. And there were two on this plant, then?
A. Two on night shift, and day shift.
Q. Who were on the night and day shifts? Give me the names of those men?
A. I don't know if I can separate them. (Referring-. Dobson and Linn were drill men, and we had Tierney and Green: I don't know whether Dorman was there at that time or not.

We paid laborers there $2.50 per day. I don't remember paying any $2. Once in a while we started in a man at $2 and if he was all right we paid him -2.50 or let him go and tried another one. A few men we paid $3. We paid -1.75 to those men marked down "Nigger" and "Snyder" for pumping.

117 FRANCIS W. BELKNAP, recalled for plaintiff, testified:

Direct examination.

By Mr. KINDLEBERGER:

Our company has leased a pile driver about ten or a dozen times.

Q. Are you familiar with the fair daily value of a pile driver with tools and equipment?

A. I am familiar with what I got in leasing them. That was supposed to be the reasonable value. With tools and equipment we got $8 and $10 a day and on one occasion we got $12.

Q. Do you consider to be the fair and reasonable value of a pile driver $8 a day that you have charged up here?

A. That figure was put down by my instructions. I do consider it reasonable. Our company had six pile drivers at that time, and we had other contracts and other work at the time. We could have used that pile driver in South Brooklyn if it had not been used on this wreck.

Q. Now about this diving dress, do you know anything about that, why it was bought, and what was done with it afterwards?

A. I bought the dress and agreed to pay $32 for it, and charged it all up against this job because divers' dresses deteriorate very rapidly, and we had no diving work at that time, and you can't sell them second-hand, that is impossible. We have at the present time in New Jersey some twelve dresses which have been used about ten days, and we cannot get any figures on them at all.

Q. I see in your payroll under expenses you have charged
118 an item of $2.71 and another one of $17.28; can you state what those were?

A. There is another one of $30 and something. Those are just my carfares and lunches and parlor car seats. The $17 covered a period, as I remember, from the time of the wreck up to about the first week in August; it covered about five special trips which I made up to the work with reference to this wreck. The item of September 30th covers a time of two months, August and September. At that time I was going to the work about twice a week, and my average expense account for a trip was about $4, and the amount apportioned to the wreck was $30. I did not charge to the wreck the entire amount of my expenses, only when I went there for that purpose alone. The item of $25 on October 23, was a charge for money we lost on another job. I only remember that vaguely. It was something we had to take away from some job here in New York up to the wreck, and we figured at that time that the New York work cost $25 additional on that account. I would have to go over the office records to find out exactly what that was, but that is my recollection of it.

Cross-examination.

By Mr. VAN ETTEN:

Q. You have testified, "I visited the work never less than once a week, but I do not remember the exact dates when I went there."

That was during the time both before and after this accident, was it not?

A. That was during the whole job as a whole, never less than once a week.

119 Q. So there were no extra trips made there on account of this accident, but only the usual trips were made?

A. I went up to meet Mr. Coykendall the morning after the wreck. I first heard of the wreck at my home in Flushing, by telephone, about half-past nine o'clock Sunday night; that is my recollection.

Q. You had made your arrangements to go up with Mr. Coykendall before that, hadn't you?

A. No. I think when I got to Cornwall I found Mr. Coykendall was due there.

Q. Hadn't you and he made an arrangement to *to* go up there when you notified him that the drill was going to be put there, and you were to go up there to see about locating it?

A. It may be so.

Q. Don't you know it was so?

A. No, I do not.

Q. Don't you know that you and Mr. Coykendall had some talk about this new drill No. 23 being put there?

A. I don't remember.

Q. Don't you remember that you and he had arranged to go up there and see about placing it, and that he was to meet you there Monday morning, the 20th?

A. The drill was placed four or five days prior to that.

Q. Just answer my question?

A. I have no recollection of that.

Q. Don't you know you had an appointment to meet Mr. Coykendall before you ever heard of this damage there?

A. I haven't any recollection, but it would seem as if I

120 had an arrangement, because I couldn't have gotten Mr. Coykendall Sunday night after nine o'clock to make one with him.

Q. So is it not your recollection that you and he had an appointment to meet there on Monday morning?

A. No, sir; it is not. My recollection is very vague, but when I reached Cornwall I found he was already on his way there.

Q. And didn't you know that was pursuant to an arrangement he had with you?

A. I am perfectly willing to admit that it may have been, but I haven't any recollection of its being so.

Plaintiff rests.

Mr. VAN ETTEN: I move to dismiss the complaint on the ground that they have not made out a cause of action, without stating the grounds, but will raise them all in the brief, and presume the Court will pass upon them with the whole case.

The REFEREE: Yes.

FREDERICK COYKENDALL, sworn for defendant, testified:

Direct examination.

By Mr. VAN ETTEN:

I reside at 1 West 72nd Street, New York, and am General Manager of the Cornell Company, and was in the year 1908.

Q. And you remember the occasion of the placing of a new drill known as No. 23 on the map?

A. I remember the occasion of the placing of the fourth drill, I do not remember the number. I had a talk with Mr.
121 Belknap about that. I got notice that another drill had been placed there, I think, on Friday, July 17th, and before I got the inspector's letter. I telephoned Mr. Belknap immediately after that.

Q. And what took place between you?

A. May I state something that happened previous to that, that led up to it?

Q. Yes, you may state anything that happened in connection with you and the plaintiff, or its officers?

A. (Referring to note book.) On the 8th day of July I called at the office of the Phœnix Construction Company at 12:45 o'clock to take up the question of the three drills that were then anchored opposite Storm King. I saw Mr. Belknap at that time, and we just had a general discussion about the danger of the drills that were there. I talked to him and objected to the drills being there, told him they were dangerous, and so forth, and asked if there wasn't some way he and I could get together and see if one of the drills could not be suspended in operation, or one taken away or removed, so as to make greater safety for steamboats. We agreed we would go to Cornwall and look it over some time. Now, down till the 17th of July—at that time I got a notice from one of our steamers that an additional drill had been placed there, making four drills, and then I called up Mr. Belknap and said, "You have now four drills there, and we certainly are going to hit you. It is only a question of a very few days that something is going to happen, and I would like to make an appointment to meet you there with one of our captains." On that day we made an arrangement for Monday, the 20th of July. I was to go up on the train leaving Wee-
122 hawken at 9:15 in the morning and meet Mr. Belknap and should have one of our captains with me. In accordance with that arrangement I went up on the morning of the 20th, and when I arrived at Cornwall I was notified from the Newburgh office that there had been an accident the night before. That was the first I knew of the accident. Mr. Belknap and I then went out to the drill and we discussed the situation in general as well as the accident of the night before.

Q. Mr. Belknap has testified that you took a launch out there and let it float on the ebbtide, is that correct?

A. Yes, sir; I think we took a row boat and let the row boat float. I think it was an ebb tide then, and, if I recollect, the set of the row boat was from the drill towards the westerly shore. It

was very smooth water; there wasn't enough wind to notice which way it was.

Q. Did you examine the wreck there?

A. I stood on the wreck. It didn't amount to very much at all. The barge had been damaged a little bit, on the corner that pointed up the river. The drill platform that was over the front of the scow had been carried away and was gone completely, and one cable, as I understood, had been parted, the cable from the up-river starboard corner, and I was told by men on the drill that the tow did not collide with the scow, but struck the cable running from the scow down, and that in striking that cable the cable parted and then one of the boats struck this corner and produced the very slight damage on the corner of the scow.

Q. Was it someone on the plant there?

123 A. Yes, I couldn't recall his name. Mr. Belknap was there; he and I were right together, and this talk was right in his presence.

Q. Is there anything further you desire to state about that at that time—as to your conversation with Mr. Belknap?

A. I think I stated to him at that time we should object to his replacing the drill in the same position. This is the substance of my conversation with Mr. Belknap, except we talked about the repairs to the barge and I told him I would be perfectly satisfied with whatever he did, because I supposed he would make them as economical as he could.

Cross-examination.

By Mr. KINDLEBERGER:

Q. Didn't you tell Mr. Belknap at that time to go ahead and repair all damages the same as if he was doing it for you, or words to that effect?

A. I told Mr. Belknap I would be satisfied to have him make the repairs just the same as he would make them if it was for his own account, that I would not question his bills.

Q. You led him to imply that you would pay whatever damages would be done?

A. On the contrary, I told him we would not pay any damages, that we did not consider ourselves liable, and would not pass any judgment on it until I looked into the case and found out the circumstances of the collision.

By the REFEREE:

Q. Did you learn that the scow had drifted down the river fifty feet?

A. I didn't know it that morning. I was not informed of that. They told me the pipe had broken off below and the drill
124 stand carried away. I did not see any pipe there; it was broken off under the water.

Q. Did you notice how the scow was anchored while you were there?

A. Headed up stream; anchors out. As I recall, she was anchored at the port corner, none on the starboard corner. She had swung around a little; anchors to the south. I don't recall how many.

By Mr. KINDLEBERGER:

Q. You recall that the scow was several hundred feet below the line of the other boats?

A. I wouldn't like to say I recalled that, but I knew there had been a disturbance. I do not recall her position.

Q. Well, you knew she was not in line with the other boats?

A. No, I don't know that. I didn't know it till now, in fact.

Q. I show you plaintiff's Exhibit 6, which shows the position of the scow after the accident, the scale being one hundred feet to the inch, and I ask you whether that does not substantially accord with your recollection, the dotted lines being the position of the scow after the accident?

A. I have no recollection of the position of the scow as to the line of the other boats at all, but I presume she had been disturbed somewhat, because this anchor was broken off and the scow was a little in counter position—you have it there—but whether ten feet off the line, or fifty feet, I paid no attention. As I recall there was only one anchor line from the up stream end holding.

Q. How many tows of your company go down the river every night as a rule?

125 A. It depends on the time of year. In July there were four passing that territory every day. I am familiar with those tows. They usually have a hawser 720 feet long, from tug to tow. We used both Manila and iron hawsers. I don't know which it was in this case, I think it was a steel hawser. We keep complete records of the number of canal boats put in each tow. I don't know at present how many boats were in this tow, but I could find out. The Pocahontas is a boat, I think, of 750 h. p. I can't give the size of her engines off-hand; she is about 24-50, or 24-48, somewhere around there, and 115 feet long. A canal boat is from 90 to 110 feet long; the usual canal boat is 90 feet. The tiers are made up tight, one right against the other, sideways, and lengthwise we usually try to have them six feet apart. Ten tiers long is the ordinary tow, in other words, 1,000 feet, so that with our tugs about 115 feet and hawser 720 feet, there is something over 1800 feet in the tow. I have been on these tugs from time to time.

Q. You know it is rather difficult to change the course of a tug that has a heavy tow, don't you, these long tows?

A. Relatively, it is difficult,—not difficult in handling a tow, but a tow must be handled very differently from a boat running alone—much more time given to shape your course.

Q. Now, these canal boats that you send down, have they any steering apparatus?

A. Most of them. I wouldn't say all the boats in this particular tow had rudders on, but nearly all. They have rudders to steer, but they are not permitted to steer in the tow by the way they are made

up, locked so close together that the rudders won't work.
126 Their course is entirely dependent on the movements of the tug.

CASE RESUMED—MARCH 10, 1910.

Mr. VAN ETTEN: I offer in evidence a letter from the War Department enclosing the records from their office relating to the work in connection with the water supply of the City of New York, and the permits on file in the office of the War Department.

Mr. KINDLEBERGER: I do not object to the form in which the proof is offered, but I do object to the permit which is not the permit for this work.

The REFEREE: I will admit it subject to your motion to strike out any parts that are not material.

Said letter and accompanying papers marked Defendant's Exhibit D-10.

Mr. KINDLEBERGER: I offer in evidence a letter dated April 18, 1908.

Mr. VAN ETTEN: I object to it as incompetent, irrelevant and immaterial.

Objection sustained; exception.

Said letter marked Plaintiff's Exhibit 25, for Identification.

HENRY C. PRATT, sworn for defendant, testified:

Direct examination.

By Mr. VAN ETTEN:

I reside in Schenectady, New York, and am seventy years of age.
My occupation has been steamboating on the Hudson River;
127 for fifty years I have been master of a steamboat, and during that whole time have been engaged in the fleet towing business, with the exception perhaps of two years that I thought I would stay off the river, about fourteen or fifteen years ago. I have towed rafts and towed all kinds of vessels that were ever towed on the Hudson River.

Q. Now what would you say is about an average tow or was an average fleet tow in the year 1908?

A. Well, that year the average tow we were towing was running, I believe 30 or 35 boats. In July, 1908, I was master of the steamer Pocahontas, and I had the down tow on the evening of July 19, 1908. The Pocahontas is 120 feet long. We had hawsers 500 feet long from the steamboat Pocahontas to the head tier of the tow, and at the time of this collision we had 27 boats, seven length of boats four abreast, with three in the stern tier. We had left Albany on the evening of the 18th with 20 boats, and had picked up at different places 8 boats, making 28. We let go of one boat at Newburgh 9 o'clock that night, leaving 27 in tow. We had the tug Victoria with us that night as helper. This tow was made up in the usual way that tows are made, four abreast. For a tow of that size that would be the ordinary arrangement. We had in that tow, if I

recollect right, 26 loaded boats, with two light ones. We let go of a light boat at Newburgh, leaving us with 26 loaded ones and one light one when we got off Storm King. We had one barge, what is called a "Troy Line," loaded with merchandise, and one other boat called a box, with 200 odd tons of paper on. The rest were ordinary canal boats. When we got down in the vicinity of
128 Storm King the tide was strong ebb. As to the time this collision occurred, when we passed the Newburgh Steamboat dock our log was 9 o'clock, and after this collision I looked at my time and it was five minutes past ten. We always look at the time when anything happens. There was very little wind that evening, and what there was was about northeast. It was a cloudy night with no moon or stars, and quite dark. It was what we boatmen call a gray night. On a good dark night you can see the shore line, it shows up black, but on what we boatmen term a gray night the land and water all look alike, and the lights on the water don't show plain at all. It is what you land-men call a hazy night, I suppose, but we boatmen have other phrases. I am familiar with the power of the Pocahontas. She was of sufficient power to handle a tow of this size.

Q. And you have handled larger tows with the same boat?

A. With the consort to the Pocahontas—a boat built just like her, with the same size engines and the same size hull—I have come out of New York with 90 boats, and I have left Albany with 96 boats and picked up two. Before going on the Pocahontas I was with the Osceola for ten years.

Q. Captain, you knew there was some boring plants there?

A. I did, most assuredly.

Q. And do you remember the Fall of 1907, the number of them in there—that is, do you remember the conditions there before what was called No. 23, which was placed eastwardly of the drilling plant that you collided with, was put there?

A. Yes, sir. I had gone through there, with the conditions as they were before they were put there.

129 Q. And when was the first you ever saw this No. 23 (the one to the eastward of the west driller)?

A. I see her the first time, going down the night of the 19th, at 10 o'clock at night, when this collision occurred.

Q. Now, where was the Victoria after you left Newburgh?

A. The Victoria had landed a light boat at Newburgh and lay there a short time for orders from the New York office, and she had then come on down light, and went into Cornwall for the purpose of getting a boat. Then the Victoria come out from Cornwall without any boat and come alongside of the Pocahontas, and the captain said to me, "Captain Hank, shall I go down to locate that drill?" Says I, "Yes, go ahead." Now, it was thick, so you couldn't see the lights; the lights were confused down there that time. So the captain of the Victoria proposed to go down ahead and locate the drill so we could know just how she lay there. Peter Wrightmeyer, the mate of the Pocahontas, was in the pilot house with me, and a deckhand was on watch out on the front part of the boat.

Q. Well, now as you came down towards those drills, did you have any trouble in locating those drills? Just describe in your own way what you saw, what other vessels, if any, you saw, and what lights you saw, and all? Tell us, as you approached Storm King, just what you saw, in your own way, before the Victoria came out?

A. Well there had been a space of 800 feet between this west drill and the one that had been to the eastward, and we had an
130 800 foot space to go through there. I was told that they had brought a drill up from New York and she would probably be placed in between the one to the eastward and the one to the westward and would narrow up that space and to look out for her, and I took extra caution because I couldn't tell just how far those drills were; I hadn't gone through there before that because she was placed there that day since the boat came up. I hauled down from Newburgh—our usual course would be southeast by south half east—and as we got down towards Polopel's Island I could see the lights down below, the lights on the west shore and lights that proved to be on the driller and lights in Cold Spring, and the steamboat Central Hudson, formerly called the Baldwin, passed by us after we got some ways below Polopel's Island, and I was confused about those lights, because you couldn't locate which was the west shore and which was the driller, and at the same time a light showed up that I took to be the last scow that was put on there, off to the eastward of what would be the west driller, but that light proved afterwards to be a small boat going across the river; my taking that light of that small boat to be the new scow brought me a little further to the westward than I would have gone. Just about this time, after the Central Hudson had gone by, a yacht passed us, both of them passing me close along to the eastward. She was a big yacht, probably 175 or 200 feet long, and as she passed down by us she hauled in across our bows. At this time the Victoria had gone down ahead and rounded up to the westward of what proved to be this west driller. Just then the Victoria blowed two whistles. This yacht answered with two whistles. I kept my course down
131 the river fully expecting I was going to clear. The tow was coming straight afterwards. The only other boat in the vicinity that I saw was the Morse, coming up, and she came away around in eastward; but as she was coming up she was showing her lights, as well as the other lights there. These boats going down—this yacht had a big reflector on her stern deck, and we were then not over, I don't think, more than a quarter of a mile above the drill when she passed us—it might have been a little more than that, but as near as I can judge it was perhaps a quarter of a mile above the driller that this yacht passed us, and the Victoria blowed her whistle for the yacht and the yacht answered her.

Q. Did you answer her at all?

A. No, sir.

By the REFEREE:

Those whistles were not blown to me; they were blown by the Victoria to the yacht, the yacht passing us and across our bows she

was heading down towards the Victoria, and it is always a rule when you have a boat in the night time to blow two whistles, to signify for the yacht to go to the eastward, and the yacht answered them and went on down.

By Mr. VAN ETTEN:

It was a strong ebb tide. As to the speed we were making, we passed the Newburgh steamboat dock at 9 o'clock and we passed that drill at five minutes past ten or ten o'clock, and it is six and a half to seven miles, I should judge, from the Newburgh dock to that driller; that is the speed we were making on the land. As I say,
132 the tide was strong ebb, and at that point there the tide will run close to 2 miles an hour, so were making four miles through the water as we call it. We kept on and I saw we were going a little close, and I hauled the steamboat Pocahontas a little to the eastward. I didn't dare haul her very strong because if you head the boat to the eastward you will swing the tail end of the tow the other way. I kept her down very straight, and after a little bit when I got abreast of the driller with the head tiers of the tow—I thought that we were going to clear, and I knew two or three ranges were going to clear anyway, then I hove my wheel hard aport and hauled her hard to the westward in expectation that I would swing the tail end of the tow clear. At this time the Victoria blowed five or six short blasts of the whistle. I couldn't say just where she was then; she had been just in the vicinity of the driller. The whistles blown indicated nothing to me but that there was danger back there on the tow; that was an alarm signal for those on the tow. I can't say whether the Victoria was alongside of the tow at that time or not. I was looking out for the steamboat. They could answer that question. There is a line signal that the helper blows to the steamboat if they want them to do anything, which is understood by the captain of the steamboat and the helper. My mate was a licensed man.

Q. And did you and he consult about these lights and as to the manner of approaching this as you went up?

A. We did, we talked of the matter, from way up by New Windsor, about going down there.

Q. And were the conditions of lights and tide and all such things at this point — as to make it an exceedingly hard place to take this
133 tow through?

A. It was.

Q. Now before driller 21 was placed there, what was the usual and ordinary course of a tow at ebb tide?

A. We would start at New Windsor and haul down south by east ½ east until you get to Polopel's Island, and then haul south by east ¾ east, and that will take you through the Warrigot, as we call it, down by Storm King and Butter Hill, so-called, and Little Stony Point. Our course at the place where the driller was would be south by east ¾ east.

Q. And that would carry you how far from the west shore; in

other words, this driller No. 21 was it in about the usual course of your tow?

A. That driller was in the exact course that a boat would go down with a tow, if she hadn't been right there,—19 tows out of 20. I speak of the driller nearest the west shore. That is the one I collided with. I would like to qualify an answer I gave a little while ago about the license of the mate. I understood he was a licensed man but I never saw his license as it wasn't necessary to have his license in the pilot house. I do not want to answer that he was a licensed man, if I don't know it.

Q. As an experienced navigator did you on this occasion do all that you thought could be done to avoid any collision with this drill?

A. I did, sir.

By the REFEREE:

We call little Stony Point the point that makes off to the eastward from Cold Spring.

By Mr. VAN ETTEN:

Q. Now, it has been testified here that you stopped and
134 that your tow was coming down broadside. Is that correct?

A. It is not correct. I did not, at any time, stop. I slowed down for about half a minute. When the steamboat was just about abreast of the driller I just slowed down—I looked out of my pilot house window and looked back and I seen there was no use to slow, and I hooked up again, and I will swear it wasn't half a minute that I slowed. I did that with the bells and I kept my hand right on the bell right by the window all the time.

Cross-examination.

By Mr. KINDLEBERGER:

I have known about these borings being at this place for several years. I have gone through there thousands of times and that is the only accident I ever had. I have been through there often on the ebb tide.

Q. And have you been through when this boring 23 has been in there—since the new boring has been in, the one that was new on the night of the accident?

A. That was the first time we went down when she was there.

Q. But you have been there since then lots of times?

A. Not so many times, because afterwards I was changed off on other boats on the upper end of the route. I have been through there over that ground thousands of times. I have been there since the new boring was there. There were 26 loaded boats and one light boat in this tow. I can tell you within a few tons the weight of the cargo on one of these canal boats. The average weight of
135 an Erie grain boat is 240 tons, cargo, and the boat itself weighs somewhere in the neighborhood of 60 tons, making about 300 tons for the boat and cargo. The ice boats of the North

River you have a few tons more in, as they load a lit-le deeper. They won't carry as much as 350 tons; they get done carrying grain and they make ice boats out of them. They would be a little less than 300 tons, perhaps. There is a captain of an ice boat here who can tell you better than I could.

Q. Then calculating them roughly and calling them all 300 tons, the combined weight of the 27 boats would be 8100 tons?

A. Well, they were not all Western ice boats, there were some Northern boats and they carry only about 160 tons, boats that come down the Northern Canal carry only four feet of water. Making allowance for that we would have a total of about 7500 or 8000 tons for the fleet.

Q. Now, when you spoke of carrying 98 boats with the Osceola they were light boats, were they not?

A. No, sir; they were loaded boats. We took 96 boats from Albany and picked up two, making 98; we might have dropped off perhaps a dozen of them on the way. We landed that tow in New York at Coenties Slip. We go there with what is called a canal tow. Some boats are picked off in the North River and landed along, taken off by helpers, but our tow is landed at Coenties Slip. On this occasion with the 98 boats we may have had not to exceed three helpers making four tugs in all and I wouldn't say that we did have
three helpers, but sometimes they sent a helper to us just as
136 they happen to have the neiper at the office.

Q. Now, you are familiar with the conditions at the Poughkeepsie Bridge?

A. I am. The width of the channel there is about four hundred feet between the abutments, where we go through. As to the tide there, the ebb tide it runs down and at flood tide it runs up. There is a little set on an ebb tide, from the east shore, it sets to the westward a little.

Q. It is a strong tide, isn't it, stronger than at Storm King?

A. No, sir; it is not; about the same, but if anything there is fully as much tide at Storm King and down through the Warrigot and it dosen't run as straight. I have never hit the Poughkeepsie Bridge, nor have had no special tugs to help me through there, no more than other parts of the river. There is a small tug that is stationed at the Poughkeepsie Bridge to hang around behind the tow and watch it. It is put there by the bridge company, I understand. The Pocahontas was 120 or 125 feet and 500 feet of hawser would be 620 feet; a canal boat is a little over 90 feet and about 10 feet space between each tier, making 100 feet for the boat and space, and seven lengths of boats would be 700 feet plus 620 feet or 1320 feet as the length of our tow about. The width of a Western canal boat is 17 feet 6 beam.

Q. What was the width of your entire tow?

A. Well, in the head tier we had a barge called the Hardy, I think, about 32 feet beam. The others were ordinary width canal boats, 17 feet 6 beam, so it would make it about 80 feet or a little over wide.

Q. I make it just exactly 90 feet?

137 A. Well, call it 90 feet, it may have been a little more or less than 90 feet.

Q. Now when you first started to change your course, Captain, before you got to the boats, you say you starboarded your helm before you got to the boats?

A. We was but a very little ways above the driller when we hauled to the eastward, and then we didn't haul much either.

Q. Now with reference to the whistles of the Victoria, was it before or after she whistled to the yacht that you starboarded your helm?

A. Oh, it was some time after when she whistled to that yacht.

Q. When did you first see the lights of the scows?

A. We must have been probably a mile above the borings when we first seen lights down there. Perhaps they might have shown a little further than that.

Q. You saw the anchor lights when you were off Cornwall dock, didn't you, pretty well?

A. Well, yes, you could see the anchor lights when we was off Cornwall dock.

Q. And you could see there were four boats across the river, couldn't you?

A. You could see lights here and here and here and here (ind.) and lights down on the West Shore Railroad, but when you are going down onto a light you can't tell whether that light is up here (ind.) or not, but you can tell the lights cross-ways.

Q. I mean the four lights on the scows were burning all right?

A. Yes, sir. I saw lights, but I couldn't say whether they were lights on the scows or not, because there were lights on the

138 West Shore Railroad and lights down to Cold Spring, and they showed right up in there all in a bunch together.

Q. You were familiar with the lights on all the scows, except 23? You saw them before?

A. Yes, I was familiar with lights down there.

Q. So you knew where to look for those lights, didn't you?

A. Well, going down there you have got the whole width of Newburgh Bay and you have no shore either side going along down to gauge yourself before to make a cushion down there, as you have at the Poughkeepsie bridge. You come down there, you may say, blind, until you get down there and make them lights, and you can't tell whether they are to the westward on the West Shore Railroad down there, on the driller up here, or whether that light down to Cold Spring is on the driller to the eastward here, until you get pretty close down to them. You get pretty close to them before you can make out whether that light is down there or up here (ind.). My course is south by east ¾ east when we get along about there.

Q. Now wouldn't that take you to the west of boring No. 21, the one that you hit?

A. I would have to explain that to you. It depends on where you start from. If you start, say, here at New Windsor, and if you

are well down to the westward and steer south by east ½ east, of course it will take you to the west of the driller, but if you are over here where you belong on your regular course, before you head your steamboat down on her course, it will bring you to the eastward of that driller. I never went to the westward of the driller with a tow.

139 Q. At first before you starboarded you were heading somewhat to the west of No. 21, were you not?

A. No, sir; we were not heading to the westward of 21.

Q. How many points did you starboard when you starboarded your helm and changed your course?

A. We didn't change our course but very little.

Q. Three or four or five points?

A. No, sir; nothing near that. If we had we would have thrown the tail end of our tow off to the westward. To change from south by east ½ east, when we went down by Polopel's Island we changed ¼ of a point.

Q. Yes, but you say you changed your course a little, you starboarded again?

A. I hove my wheel a little aport, and when I see the tow was going clear I then hove hard aport, and I can't tell you just how many points I changed, because I hove hard as I could to swing the tail end of the tow to the eastward.

Q. Now see if I understand you. As I understand, when you got to Polopel's Island you had been steering at that time south by east ½ east?

A. Yes, sir, and I only changed to south by east ¾ east.

Q. Didn't you change a little bit more to the starboard before you came to the borings? Didn't you testify to that?

A. Very little.

Q. How many points?

A. I didn't look at the compass. I just hove the wheel a little bit, and the Pocohontas altered her course a little to the eastward, and I seen as I looked out of the window and looked back

140 that the head tiers were coming on clear, and I then hove aport.

Q. That is after you got past the boring?

A. That is after the steamboat had gotten down by the drill.

Q. But I was talking about before the steamboat got to the driller, you had starboarded your helm some?

A. Very little, because I didn't want to swing the tow.

Q. As a matter of fact the tow did swing, didn't it?

A. I think not much.

Q. Well, you know the accident could not had happened if you hadn't swung the tow, because you know that you went clear all right?

A. Well, we are not as wide as our tow, and a tow of canal boats will slide a little bit anyway.

Q. Now did you turn around and look backwards when you got past. When you started to port your helm you noticed then that the tow was swinging crosswise, didn't you?

A. I couldn't see that we were swinging a very great deal.

Q. You would not have ported your helm if they hadn't swung, would you?

A. I ported the helm to make them swing to the eastward. I infer from your question that you ask me if the tail end of the tow was swinging to the westward?

Q. Yes.

A. It was not. I hove my wheel to the port, to swing them to the eastward—the tail end.

Q. As a matter of fact it did swing to the westward, didn't it?

A. No, sir; I will not allow as a matter of fact that it did
141 swing that tail end to the westward. I will say that the tow was going straight, but the tail end was a little to the westward of the head tiers. They were not swinging more than the usual swing of a tow.

Q. How far away from boring 23 did your tug go when you passed?

A. The Pocahontas might have went, probably, in the neighborhood of 100 feet.

Q. And how far away from boring 21 did you go?

A. They claim 21 was five hundred feet from 23, that is the east driller, and of course we would be less than the width of the Pocahontas—three hundred and some odd feet.

Q. Now aren't you a little bit mistaken about that? Weren't you within 100 feet of 21, the one that was struck?

A. I will swear that we were not within 100 feet of 21, and I will swear that I do not think we were over 100 feet away from 23.

Q. If you were only 100 feet away from No. 23, that is 400 feet from No. 21?

A. Less than four hundred feet because there was the width of the steamboat.

Q. Well, say 375 feet then? If you were 375 feet from No. 21, this boring to the west, and the rear of the tow, or two tiers away from the rear of the tow, struck this boring, then there must have been considerable slant, must there not, across the river?

A. Well, perhaps it seems a little strange to you, but to a steamboat man with a tow it does not seem so at all. You are going down the river on an ebb tide, and here is the drillers down here, and when
I made out these lights to know exactly what they were I
142 was so close that I didn't dare to haul hard to the eastward because it would swing that tail end of the tow right around across. I kept my course as close as I could, but I did heave a very little bit starboard, and I then hove hard aport to straighten up the tow and keep them from swinging on the driller.

Q. The chart here shows the distance between boring 23 and boring 21 to be 575 feet. Now, if you were about 100 feet from boring 23, allowing for the width of your boat, you must have been at least 425 feet from boring No. 21?

A. Yes. I should say that was about right; but the reason we were as far to the westward as we were was the light on the small boat, that I took before to be the driller that had been newly placed

in there, and that brought me further to the westward than I should have gone. That was where the trouble come in, this light and the lights being confused from below.

Q. How did the tide set right there?

A. Well, on an ebb tide the tide will set a little to the westward above them drills, but after you get further down the tide strikes in close to Cornwall and deflects over and strikes over to Little Stony Point. I knew the set of that ebb tide before I went down there, and when I went by I made all calculations for the tide to the best of my knowledge and ability.

Q. Now just describe how it was that these scows or boats hit this boring? Did you happen to turn around and see it?

A. When I was heaving my wheel over I put the wheel in the becket and I looked right back out of the side window of the pilot house. I couldn't see in the dark which tier of boats struck,
143 but I was told it was the fifth tier from the head or the third tier from the tail end that struck this cable. There was no crash, no more noise than there is in this room, as far as crash was concerned, that I heard. A boat dragging over a cable wouldn't make much noise, just sliding over the cable. The boats didn't hit the driller. I heard noise of a whistle blowing. The Victoria blowed five or six short, sharp blasts of the whistle at the time the boats were about there.

Q. Outside of the whistles was there any noise attending this collision at all?

A. Not that we could hear at all five or six hundred feet away—the other tow was 8 or 9 hundred feet away.

Q. If you had starboarded your helm higher up, wouldn't you have cleared this boring No. 21?

A. If we had gone further to the eastward, of course, we would have cleared it, but as soon as I could make out where these lights were—I couldn't see just which was the lights on the drillers or which was the West Shore or which was Cornwall or which was the east driller until we got down pretty well towards them.

Q. Now, if you had ported your helm a little bit sooner wouldn't you have swung your scows clear then?

A. I put my wheel over just as quick as it was my judgment to do it.

Q. But suppose you had ported your helm 30 seconds or a minute sooner, wouldn't you have cleared the drill?

A. I couldn't tell you. I used the best judgment I could and think it was proper.

By the REFEREE:

Q. Could you now tell as you look back on it, whether
144 you would have got by if you had ported your helm sooner, without hitting the scow?

A. I think not, sir, when we were down on them as close as we were.

By Mr. KINDLEBERGER:

Q. I mean if you had ported your helm 30 seconds or a minute before you actually did, would that have straightened up the tow and prevented it?

A. No. I thought the tow was going clear until we got down so far that I seen that we had to heave to the westward and try to swing the tail end. I seen four or five of the head tiers were going clear, and to make sure I hove her aport to swing the tail end. I can't explain it any more than that.

Q. But I mean if you had ported your helm a little bit sooner, do you think it would have gone clear?

A. If I had ported very much sooner the steamboat would have gone onto the driller. I had to wait until I got a proper distance before I commenced to haul. If I had hauled sooner, then I would have hauled the head tier onto the driller.

Q. How far past the line of the borings were you when you started to port?

A. The steamboat was probably 400 or 500 feet below the driller. That would bring the head boat of the tow almost to the driller.

Q. But if you had ported when only two hundred feet past wouldn't you have gone clear then?

A. I will have to answer that I don't know.

Q. If you had been 100 feet past before you ported then you certainly would have gone clear?

A. I don't know.

145 Q. You had power enough to manage your tow, didn't you?

A. We had power enough to tow that tow, and to manage it in a narrow channel. We had sufficient power to manage it under the Poughkeepsie Bridge, but there we have a shore to cushion on down there, we are not running into a pocket, as where these drillers are.

Q. You know you had over 600 feet of west channel and over 400 feet of this channel?

A. You say, between the west shore and drill?

Q. Yes, there is a 600 ft. channel there?

A. We had at that point, but not below. There is a point that makes out below them drillers, which is the reason we don't go to the westward on ebb tide. If you will draw a straight line there west of the driller you will find you haven't got 600 feet by a good deal, because there is a point makes out below on the west shore, probably several hundred feet.

Q. This blue print here shows that for a distance of 1,000 feet or more there is no point?

A. I doubt but what it is, probably. Going down on ebb tide, with rocks on that side, we don't want to run quite so close to the shore. That is a very deep part of the river there, but that is the trouble. It is a bold shore, but if boats go against the rocks there it might sink half your tow. The Victoria had a hawser out from Clearwater till she got down to Newburgh, but between Newburgh

and this point the Victoria didn't have hold of the tow. They sent a helper to pick up and land boats and to do things of that kind. The Pocahontas did not blow any whistles at all before this accident.

146 Q. How far ahead of you was this yacht passing the borings?

A. When we passed the borings she was then half way down to Magazine Point. When she passed the borings we were then probably 500 or 600 feet above. I think more than that as near as I can tell. I did not have to slow down on account of the yacht. They were going by us slow, very easy, as it was dark down there—The yacht did not bother me at all, only by her light; she had a big reflector right on her stern deck that shown right in my face, and that helped to confuse the lights there, otherwise she didn't make any difference at all.

Q. You were accustomed often to have yachts around when passing points?

A. I say it made no difference. It was that confusion of lights of course it made more confusion of lights there. I knew that this boring No. 23 was going to be put there. I had heard they had brought another driller up and expected to put her in to the eastward and to look out for her, so I was paying special attention to that driller, knowing it was there in the river, and I took that light, as I have said before, of that small boat to be that new driller put in there.

Q. Well, the small boat lay very near the water—the light was near the water, wasn't it?

A. Not very low either. It was pretty well up, whether it was on a pole, or there may have been two men in the boat or something like that and holding a light up, but it looked like it was a light on the scow.

Q. The scow lights were at least twenty feet above the water, weren't they?

A. Well, looking down there of course you may have
147 seen them, but I took that light to be a light on the scow.

Q. In all your experience you know the difference between a little light in a row-boat two or three feet above the water and——

A. That light was more than two or three feet above the water.

Q. How far was it?

A. Well, several feet; I couldn't say just how much.

Q. And the anchor lights were twenty feet, about?

A. I suppose they were.

Q. You could tell the difference between a twenty-foot light and a light that was three or four feet above the water?

A. Well, that scow just being brought there, as I understood, I couldn't tell just what the light was, and it wasn't a clear light either.

Q. But you could tell the difference between a stationary light and a moving light, couldn't you?

A. A stationary light is all right, but if that light is moving up the river straight towards you you can't tell whether it is stationary or not, but if it was going across of course you could. This light was

not going across for some time. I judged myself afterwards they were pulling up the river to get ahead of the west driller, to get across her bow, to go to the west shore, and for that reason that light seemed to be stationary for some time. Finally, when we got down pretty close to the west driller I could then see the light going across the river and then I made out it was a small boat. I was on the Pocahontas only a short time after the accident. My boat was the Oswego. That was not the northern tow; we take the Hud-
148 son tows down and change. We passed the same points on the Oswego, but not every trip. We change; sometimes we were below, and sometimes above.

By Mr. VAN ETTEN:

Q. Comparison has been made as to the Poughkeepsie Bridge. Just describe the lights you have there to guide you through the Poughkeepsie Bridge.

A. At Poughkeepsie Bridge we have a red light on each pier, and right in the center of the span, up on the bridge proper, there is a green light that shows from above and from below, the same on the upper side of the bridge as on the lower side.

FRED SICKLES, sworn for defendant, testified:

Direct examination.

By Mr. VAN ETTEN:

I live at Athens, Greene County, New York. My business is boating, off and on, for 16 or 17 years, on the Hudson River, and during that time I have been in fleet tows, both up and down the river. On the 19th of July, 1908, I was in a down tow of the Pocahontas, in charge of the Howard Steller, a canal boat about 90 or 92 feet long and 22 feet wide, which was loaded with ice. I recall going through where these drills were that night. I stood right alongside of the cabin on my boat.

Q. As your tow approached down there what do you say was the course or direction of your tow, were you going broadside or pretty well straight down?

A. Pretty well straight down. I didn't notice the lights down below. I wasn't looking for lights.

149 Q. Now as you came along by this drill did your boat collide with one of the drillers?

A. I run up onto a cable. My boat draws six and a half or seven feet of water. Then we was going pretty straight down the river.

Q. Now what did you first notice? Did you collide with the platform there?

A. No, sir.

Q. What did you notice that lead you to think there had been a collision of any kind?

A. I run onto a cable about amidship and it keeled me up a little bit. We slid right along, and there was a light boat tailed on behind me and a woman and two children on her and the woman com-

menced to holler and that attracted my attention back to the tail end of the tow, and that seemed to follow me right straight down. I didn't see them hit at all. There were two boats behind me; neither of the other boats hit the platform as I could see. Their direction behind me was straight. My boat must have been 25 or 30 years old. She wasn't in very good condition at this time.

Q. Was she in a condition that she could have withstood a hard collision?

Objected to as immaterial. Objection sustained. Exception by defendant.

Q. Was there any damage done to your boat?

A. No, sir; and neither of the other boats behind me were damaged that I saw. While I stodd by the cabin of my boat, I would judge my boat went 15 or 20 feet or more from the platform.

150 Cross-examination.

By Mr. KINDLEBERGER:

When I heard the woman cry out I turned around and looked back. I didn't see the lights suddenly go out on the platform. I didn't take any particular notice of the platform; I wasn't looking at it. I saw the lights there when I went by.

Q. There were four or five lights on this platform, were there not?

A. I couldn't swear to that. I couldn't say whether there was more than one light there. My boat was on the starboard side, and that side of the boat hit this cable.

The lights were burning on this platform when my boat went past. I did not hear any noise at all.

Q. Well, now, when you say you were going pretty straight down, how do you know when you were not looking at the lights?

A. I could tell by the boats ahead of me.

Q. In other words, they might have been more or less across the river, but as long as the boats ahead of you and behind you were straight——

A. I could tell that by the drill.

Q. The boats were some ways across the river were they not?

A. No, sir; not as I know of. The boats were absolutely straight up and down; right straight up and down with the drill, and that is supposed to be straight up and down the river. The boats were not leaning even a little bit to the west, I am sure of that. I did not notice the other lights on the other drillers. I am not a licensed man.

151 CHARLES B. HULSAPLE, sworn for defendant, testified:

Direct examination.

By Mr. VAN ETTEN:

I was the engineer of the tug Pocahontas on the night of the 19th of July, 1908, and I remember the evening when a collision occurred

with the drills below Cornwall. I did not observe as we went down the course our tow was taking. The first thing that called my attention to anything unusual that night as we got near those drills was when I heard the Victoria blowing. She blew five or six short blasts of the whistle.

Q. Did you hear her blow the two blasts that have been spoken of?

A. I did not notice that. I wasn't outside at the time at all. I was in the engine room. When I heard these blasts, there was nothing for me to do any more than when the captain rung the bell for me to slow half a minute and then hooked right up again. When the bell rang to slow I didn't look outside, but the tug was down around these drills, I know that anyway. I seen a yacht when she went down. I was in the engine room, I looked out through the windows and see she went down to the eastward of us. I couldn't say just how long that was before I heard the whistles. I got a bell to slow; the next bell I got was hooking-up bell, which means full speed, and between the two there wasn't an interval of over half a minute if there was that. I didn't get any other bells before or after that.

Q. Had your tug's motion through the water slowed to any extent in that interval?

A. I couldn't say it had any effect on the slowing of the
152 tug at all. I didn't notice how far away we were from this drill as we went by.

ROBERT T. SCISM, sworn for defendant, testified:

Direct examination.

By Mr. VAN ETTEN:

I reside at Athens, New York. My business is steamboating, in the capacity of deckhand, and have been doing that three years. On July 19, 1908, I was deckhand on the Pocahontas. As we went below Newburgh down towards this drill, I was on the deck on the starboard side of the bow. I saw the Baldwin and the yacht pass us, and I seen the C. W. Morse going up, and a row-boat—a lighter, which looked as if she was right near the drills. It was kind of a cloudy night, and hardly any wind at all. I heard the Victoria blow two short whistles, and afterwards I heard her blow about five or six other whistles. After she blew the two short whistles the *yatch* answered her. I didn't notice what course the yacht took as she went past us.

Cross-examination.

By Mr. KINDLEBERGER:

Q. Did you notice the lights on the drillers?

A. Well, I tell you I couldn't exactly tell whether they were lights on the drillers or on the railroad——

Q. There were bright lights on the drillers and on the railroad too wasn't there?

A. Yes, sir.

Q. When did you see the row-boat?

A. Well, I don't know, but just about three or four hundred feet above, before we got near the drills. The row-boat wasn't
153 going across the river when I first saw it, but afterwards it was, and the light in it looked to be four or five feet from the water.

Q. But it wasn't anywhere near on the level with the anchor lights on the drills, was it?

A. Why, it was just about even with the drills.

Q. Those lights are twenty feet up, aren't they?

A. That is more than I know, I didn't notice that particularly.

GEORGE G. WALKER, sworn for defendant, testified:

Direct examination.

By Mr. VAN ETTEN:

I live in Albany. I do steamboating, and have done that for 26 years in the capacity of deckhand, pilot and captain. I have held a license for nineteen years, and during my experience I have been engaged on the Hudson River and the Harbor of New York. I am familiar with towing fleet tows up and down the river. An average tow taken by a tug up and down the river is about forty boats. I have never been in command, nor do I know anything, of the Pocahontas. The Victoria is a smaller boat, and was along as helper on this occasion. When we got to Newburgh I took the boat "Sweet," a light boat off, and then I went for orders—there is a box that we look for orders in, and I got orders to go and look for a boat along Cornwall. I run down light from Newburgh coal dock to Cornwall, and I couldn't find the boat and I come out again and went alongside the Pocahontas, and I said, "Captain Pratt, on account
154 of them putting that new driller in down there don't you think it would be wise for me to go down and lay under the stern of the west drill and kind of direct your course down there?" He says, "Yes, that's a good idea." So I went down and rounded-to under the west drill, and just at that time I saw a yacht coming, just about when I got head-up, right for me, and so I blowed him two whistles and he answered me with two. I had been up and down the river before that night with tows, and the first I had ever seen this No. 23 was on the uptrip that same day. I helped the Osceola up and the Pocahontas down.

Q. Let me ask you as a navigator whether or not the placing of that drill made the passage of tows a difficult matter between those two drills?

A. Yes, sir. Before any drills at all were put in there, the usual course of a tow coming down through there was coming about one-third of the ways off from Newburgh and then head her down to Butter Hill, called the Storm King, that would bring our tow about where that west drill No. 21 was. After 21 the west drill had been put there, we were accustomed to go with tows to the eastward of the drill.

Q. Now, you say you blew the yacht two whistles and she answered?

A. Yes, sir; and the fellow on the drill and I had a conversation there. He says, "What are you doing down here?" I says, "Just coming down here to lay to guide the tow through here." He says, "We will be through with this damned hole about next Tuesday. We have been working on it—two years" (I think he said). I saw this row-boat that has been spoken of. The row-boat came over to the west drill, and the fellow had a light in it, standing up.
155 We laid there under the drill. I couldn't lay at the drill on account of the anchor chains, couldn't get up to it, and I lay back there and kept touching her up every once in a while. I wasn't fastened to anything.

Q. It has been testified that you made fast to the platform. Is that a fact?

A. Didn't have a line on it. I couldn't get near them on account of the anchor cables; they run east and west and north and south. We had a talk there. He says to me, "That tow is going to come pretty close to us." I said, "I guess she'll clear you all right," and when I saw that she was going to hit I said, "You better get in the small boat, I think that tow is going to hit you." Then I edged off to the westward, and as soon as I surmised she was going to hit I hooked the boat up and run alongside and kept blowing the danger whistle to wake the people up that was on the outside boats.

Q. Were you where you could see whether or not the tow hit the platform?

A. Yes, sir; I was right there. The tow did not hit the platform. The Howard Steller went up on the cable. There wasn't a boat hit. I saw the last boat go by the drill. I was right there at the time. When the tug Pocahontas came through between 21 and 23 drills she was a little eastward of the middle of the two drills.

Q. What do you say about the condition of the tow as to its being in line or not?

A. It was right straight. I was in a position — see it, and I see the tow straight. The tide there sets to the eastward from a point just above the drills.

Q. What is just above there?

A. It sets to the westward into that gap in Cornwall—not
156 much of a set at that, and then when you get down there it sets off towards Stony Point.

Q. Is it a difficult place to navigate or was it a difficult place to navigate when 21 was there, before 23 was put there?

A. No, sir. The second scow put in there, you mean?

Q. No; before 23 was put in there?

A. We didn't think so.

Cross-examination.

By Mr. KINDLEBERGER:

I was looking right at the drill at the time the Howard Steller hit the cable. At that time there were lights on the drill.

Q. How soon after that did the lights go out?

A. The lights didn't go out on the drill, did they?

Q. Didn't you see them go right out on the platform after the tow went by?

A. Yes, sir. I was right there at the time. They all went out suddenly, all on the platform, except the light that the fellow had in the small boat.

Q. Now, when did they go out? When the Howard Steller hit the anchor line?

A. Afterwards when it dragged that upright——

Q. Which dragged the upright, the Howard Steller or the——

A. The two boats behind didn't hit it at all, didn't touch it. The Howard Steller parted the northwest cable; it broke that cable off. It was the northeast cable he hit, but parted the northwest cable. It didn't break the northeast cable; that hung on. I
157 couldn't say whether she parted or not. As far as I know, it did not break the cable that it slid on, because the whole business swung to the eastward. These lights that were on this platform did not go out as soon as the boat started to ride up on the cable; not right away, not till it swung around. It might have been a minute. The last boat at that time was about abreast of the drill, twenty or twenty-five feet from the drill.

Q. Was that the nearest that any boat got to the drill?

A. No; the Howard Stellar got, I should say, about 15 or 20 feet. She didn't get right up on the drill; if she did, she wouldn't be there. I say that those boats were comparatively straight. I know that the Pocahontas went considerably to the eastward of the middle of the channel between 21 and 23. She was over 300 feet from the west drill.

Q. You know as a matter of common sense if the Steller was fifteen feet from the drill and the Pocahontas was over 300 feet from the drill when she passed, that they must have been slanted over towards the west, don't you?

A. Yes, sir; and I suppose the captain of the Pocahontas was figuring on the set of the tide.

Q. Then they were not exactly straight up and down?

A. Yes, sir; the tow was.

Q. How could it have been? The tug was 300 feet to the east of the west drill, and this other boat you say was about fifteen feet to the east?

A. It didn't make any difference what way the Pocahontas was, the tow was straight. I wasn't watching the Pocahontas after she went through, I was watching the tow and the drill. I mean
158 to say the entire tow, four tiers abreast, was going straight, but was only fifteen feet away on the starboard side of it from this drill. I was right there and in a position to see. It wasn't going diagonally across the river. I was headed straight up and down the stream. I have been going past there every other day in the summer seasons for twenty-four years. When I came down there I saw the lights on all those drills.

Q. And they were burning all right, weren't they?

A. I noticed these two particular drills, but I couldn't swear whether there was lights on the far east drill or not.

Q. But you say there was a good light on 23, burning all right?

A. I never saw a good light on her. There was an anchor light there, if you call them anchor light. You could see it, and sometimes you would have to have a match too. I saw a light on 21, the west drill; she had three lights there.

Q. You saw the men working there, didn't you?

A. Saw them sitting there talking, they weren't working; sat talking to me.

JOHN F. MALLOY, sworn for defendant, testified:

Direct examination.

By Mr. VAN ETTEN:

I live at Rensselaer. In July, 1908, I was engineer on the Victoria. I have been engaged in boating about fourteen years. I recall the night when the trouble happened with the drills there. We left the tow above Newburgh to land a Newburgh boat.

159 Q. Now when you lay behind the drill did you make fast to it?

A. Couldn't have made fast. He would ring a bell every once *and* a while and I would give a turn ahead in order to hold her up there; we were in motion, drifting back and then going ahead a little. I remember whistles being blown. I saw this yacht, but I didn't notice the Baldwin go through there. I saw the Morse coming up; seen her search light on the other side. I didn't see the row-boat; I was in the engine room and we lay back of the drill. After we had moved up I remember some whistles were blown. I was in the engine room then and didn't notice whether or not any of the boats in the tow collided with the platform.

Captain JAMES MONAHAN, sworn for defendant, testified:

Direct examination.

By Mr. VAN ETTEN:

I live at Newburgh, and am first pilot on steamer Newburgh. I have been a licensed man for about twenty-nine years and master of vessels for about forty years. Since 1857 I have been engaged in navigation on the Hudson River, and have done fleet towing about twenty-four years ago for the Cornell Steamboat Company; since then I have been on this boat. I am familiar with the location between Breakneck and Storm King in the Hudson River, and I know there have been some drills there for the last two or three years. I have navigated through there while they have been there.

160 Q. Do you know what is called No. 21, the drill furtherest west?

A. I never took any notice of the numbers. I know the first drill to the westward and one to the eastward and one between them

again. There was one between them, but not this last summer, then there was only one there, through 1908. After July, 1908, an extra drill was put there, making three. Before any drills were put in there the course of tows going down the river on ebb tide was just about where the west drill was—maybe a little east of that drill.

Q. Now as an navigator of experience what do you say as to the difficulties of navigating the river there with these drills in there?

A. All I know about the drills was it was an obstruction to navigation.

Q. Is it difficult to navigate through there now?

A. Yes, sir; in all kinds of weather and all kinds of tide, with a big tow, or alone with steamboats as far as that is concerned in bad weather, in thick smoky weather when you can't see very well.

Q. Do you know of such a thing as what is called a gray night?

A. Yes, sir; gray starlight, not absolutely dark or black. It is harder to locate a light of a gray night than it is on a regular dark night. On a dark night they are more brighter and you can range the distance better.

Cross-examination.

By Mr. KINDLEBERGER:

Q. Captain, if you can see lights for over a mile you don't call that a very gray night, do you?

A. No, you could see lights, but there is lights back of
161 that shore and that helps, you can't range the lights from your course.

Q. If you could see the lights at Cornwall you wouldn't call that a very gray night, would you?

A. No, you could see the lights, but you can't locate them the same as other nights of course—what I call gray nights. I passed these borings a good many times and never have hit them, and I know hundreds of other boats have passed them.

Q. You never have known anyone to hit them excepting the Cornell boats?

A. That's the only thing I know of that hit them. Our line, Central Hudson, had a collision with these borings in 1907, and there is a law-suit pending for that.

Q. Now when you go past that west drill in going down didn't you go down on both sides?

A. No, we only go to the westward of it. We come out from Cornwall and go to the westward always; we don't go away out in the river. It is a big wide channel and deep water to the westward, the further you go to the westward the deeper water you get. I know it is about a six or seven hundred foot channel there, when the drill is in—to the west of the west drill.

Q. And it is perfectly customary to take a course to the west of that west drill in coming down with an ebb tide——

A. Well, I am talking about us; I am not talking about the tows. We could do alone what they can't do with a tow. She has

got a big tow behind her and the tide sets to the eastward and when they straighten them the tail is going to the eastward, and they have to straighten that tow behind them.

162 By Mr. VAN ETTEN:

Q. When you spoke of going to the westward you mean with a steamboat?

A. Yes, sir, alone, and if they ketch it right with a tow sometimes they can; but on ebb tide it is pretty risky work to swing the tail of your tow to the eastward of that drill, and if you go to the eastward of them altogether you have to pull right southeast and then pull right back again like that (ind.).

By Mr. KINDLEBERGER:

Q. You know, don't you, with a long tow if you are not pretty careful you are apt to bring your scows across the river there if you change your course?

A. If you change your course going around those points you have to swing your tow behind you.

Q. I mean if you change your course pretty suddenly you are apt to swing your tow across the river, aren't you?

A. Yes, sir; if you have to sheer off from vessels then you swing your tow behind you. You have to be very careful to keep your tow straight behind you.

GEORGE B. GREENWOOD, sworn for defendant, testified:

Direct examination.

By Mr. VAN ETTEN:

I live in Newburgh and am pilot and master of boats. I have navigated on the Hudson River about eighteen years, and know the placing of those borings or drills between Breakneck and
163 Storm King. They have all been placed there within the last three or four years. I remember the conditions in July a year ago when they placed one between what had been the westward and the middle one.

Q. What do you say as a navigator as to the dangerous navigation with those obstructions, the drills, in the channel there?

A. Well, I claim they are quite a menace to navigation. With those drills located in that way it was a very difficult thing to navigate there at night, in bad weather. I know what is termed a gray night among boatmen.

Q. What do you say as to the ability to locate lights and objects on nights of that kind as compared with other nights?

A. I would say it is a very hard matter to tell. You can't pick up a light ahead of you—you can't tell where or what it is—it is a very hard matter to tell. I have observed the lights there on the west shore as you come down.

Q. And what is your observation as to the tows coming down,

the course they take on ebb tide, coming down there, between what points they navigated?

A. Well, those that I seen mostly went down between the drills, between the one on the west shore and the second one to the eastward.

Cross-examination.

By Mr. KINDLEBERGER:

I am connected with the Central Hudson and the Homer Ramsdell lines. I wasn't captain of the Poughkeepsie or the Ramsdell at the time of the accident there; I was on another one of their boats. I know there is a lawsuit pending between the
164 Phœnix Construction Company and the Central Hudson. I have passed through there a good many hundred times, and with all these drills out as described.

Q. You haven't personally had any difficulty in navigating past there, have you?

A. With the exception of one night on our uptrip, I think it was a year ago this past summer, I was captain of the Poughkeepsie and it was sort of a hazy fog-y night, and there was three or four of us there—the tide was flood; we were bound from New York to Poughkeepsie. Outside of that I haven't had any difficulty. I have never done any towing.

Q. Would you call it difficult, as a navigator, in passing that point if you could see the lights a mile away?

A. With the lone boat, no.

Q. With any boat?

A. Well, from what I have seen of towing I should say it would be. I would not call it a very gray night if I could see the lights a mile away.

Q. Isn't the difficulty in locating lights on a gray night often entirely as to how far away they are when you once do see them?

A. Yes. It has nothing to do as to where the lights are or how far apart, I should say it is just the distance away.

Q. Now, on a calm night with no wind blowing and ebb tide running, with a fleet of 27 boats, do you think a tug ought to have any difficulty in getting through there?

A. I am no tugboatman at all; I never done a day's work at it.

165 By Mr. VAN ETTEN:

Q. You spoke of some difficulty one night; what was that?

A. Three boats—the Adirondack one, if I remember right—we all drifted up through there together with flood tide, coming up there slowly, just hitching ahead now and then, and with these drills it didn't leave much room, and all those lights that are up under the foot of Storm King where they are sinking the shaft it makes it all the worse to pick up those drills. There's a number of very bright lights there on the shore and you know how it is when one is coming straight onto a bright light, you can't see one way or another.

By Mr. KINDLEBERGER:

That was the summer of 1908. The three boats, two besides myself, all going in the same direction caused all the trouble.

By Mr. VAN ETTEN:

Q. On the gray night you spoke of isn't the difficulty in locating the light more than in seeing it?

A. Yes, sir.

Q. That is, as to whether two lights some distance from one another, whether they are abreast of one another, isn't that it?

A. Yes, sir.

By Mr. KINDLEBERGER: I am familiar with the conditions at the Poughkeepsie Bridge.

Q. The channel there, between the abutments, is narrower than it is between these drills, isn't it?

A. Well, there wasn't a great deal of difference I don't believe as near as I can recollect.

Q. The channel between the abutments of the Pough-
166 keepsie Bridge is four hundred feet, isn't it?

A. I can't say that I ever heard, but I judge it would be about that.

Q. You know, don't you, that between the westerly drill and the next one to it was 575 feet?

A. I know that it was more than it was between the abutments. I should judge it was somewhere about six hundred feet. I call the Poughkeepsie Bridge a dangerous place to go through with a tow.

By Mr. VAN ETTEN:

The Poughkeepsie Bridge you have the shore right alongside more for a guide than you would in going down out of Newburgh Bay, and a straight current down through there too; and at the mouth of Newburgh Bay where it enters where these drills are the current is not a straight through current.

By Mr. KINDLEBERGER:

I am perfectly familiar with the current right where these drills are.

MARCH 25, 1910.

Hearing resumed.

FREDERICK A. MILLER, sworn for defendant, testified:

Direct examination.

By Mr. VAN ETTEN:

I live in Newburgh, New York, and am Master and Pilot of steam vessels, and have been for about thirty-three years, living at Newburgh during that time. I am now on the Homer Ramsdell of the Central-Hudson line. During all these years I have been familiar

with the Hudson River. I know that drills were placed be-
167 tween Storm King and Breakneck Mountains, and I have navigated there nearly every day while they have been there.

Q. Now, will you just tell us, in your opinion, as a navigator what the effect of those drills in the river is upon navigation through that point?

A. Well, we consider it a menace to navigation there on account that it closes up quite a lot of room and makes a very narrow passage, and I consider it the most dangerous point in the Hudson River anywhere without the drills, and of course, the drills make it a great deal worse. The reason I consider it so, the ebb tide sets diagonally across there and runs very strong, and the formation of the land, the hills are high, Storm King and Breakneck, and then above you there is an open body of water in Newburgh Bay, and the land on the west side being low the wind comes down there and acts the same as a funnel, and it strikes down through there when the wind blows —which it almost always does—a gale with great force, very heavy and chunky and the northwest and west winds set with the tide across the river.

Q. It has been stated that at the time of the accident we are inquiring about it was what Captain Pratt has described as a gray night. Do you know what a gray night is?

A. Yes, sir; it is a night very smoky and still, where the high hills shade off and come together, so it makes it very black and smoky. On a night of that kind, it is very difficult locating lights in there, on account of being so dark and black and the smoke altogether. You come down there or you come up, and I have seen nights I
couldn't locate those lights until I was within two or three
168 lengths of the steamboat of them. By "those lights" I mean the lights on the drills and the lights on the shore; makes a confusion because there are so many lights each side. I have been engaged in fleet towing.

Q. What do you say as to coming through there with a tow on hawsers?

A. Well, it is a pretty difficult thing to get through there on certain conditions. Almost I might say impossible, especially when there is west winds coming down there with an ebb tide, then the tow goes sideways across the river, and having a narrow place to go through, 800 or 1,000 feet, with a tow 1300 or 1400 feet long, of course, it is a hard matter to control them to get them through narrow places that way. We spoke of these drills as "east" and "west" and "middle."

Q. Do you remember that there was an additional drill put in between the westerly drill and what was the middle drill, in 1908?

A. It is hard to recall that. I have noticed all the changes, of course. They have changed them a number of times, but I do not exactly remember when the changes were or just how the changes were. During the time these drills have been in there, my navigation through there has been confined to the navigation of the steamer Homer Ramsdell. I haven't taken tows through there.

Cross-examination.

By Mr. KINDLEBERGER:

I remember the lights that were on these borings in 1907 and 1908. They were white lights, sometimes they were colored, sometimes there was a red light and sometimes red and white, but mostly white.

169 Q. Well, don't you know that there were always white lights at this particular place in 1907 and 1908?

A. Well, I think so. I have noticed red lights there but I couldn't tell you just when. But usually there were white lights on the borings.

Q. And that was the case during the entire two years of 1907 and 1908?

A. Well, I don't know as I would say the year. I have noticed the drills ever since they have been there, but I don't know just what year the lights were changed.

Q. Now, you have described this place as a dangerous place when the wind blows. It is a different situation when there is no wind at all, isn't it?

A. Well, the only danger at that time that I know of is the tide. I know what the tide is at that place generally, and I think every navigator going by there is supposed to know the tide.

Q. Now, you say there were nights when you could not locate those lights on the borings until you got very close to them. You are talking about foggy nights; aren't you?

A. I am talking about gray nights and black nights and foggy nights also.

Q. But when there wasn't any fog in the air and the stars were overhead, you didn't have any difficulty then, did you?

A. Well, not so much as we would in gray weather—that is in foggy weather.

Q. Now, you say in carrying a tow through there it is very hard to keep them straight up and down the river, don't you?

A. Yes, especially when the wind blows hard. The danger

170 is that the long line of tows are apt to swing across the river.

Q. And that is especially true, is it not, if the tug changes her course, which is apt to throw the tow across the river?

A. Well, if the tug changed her course, if she gets close to one drill, then she goes afoul of the other before he pulls through there.

Q. He has to be very careful to keep his tow in line?

A. Oh, he can't keep the tow in line. Can't keep it straight. The constant tendency is to swing across the river. You take a west wind blowing hard with an ebb tide, and the tow will swing in spite of him; he can't pull it fast enough to keep it straight.

Q. But that is not so when no wind is blowing at all?

A. Not so much.

By Mr. VAN ETTEN:

If there is a little wind above on the bay, it is stronger as you get into this narrow place; so, if there was very little wind on the bay there would be a fresh breeze through there.

By Mr. KINDLEBERGER:

I am captain of the Homer Ramsdell, and was the pilot on her and on board at the time of the Poughkeepsie collision in 1907.

EDMUND S. WILSON, sworn for defendant, testified:

Direct examination.

By Mr. VAN ETTEN:

I live in Albany, and am captain and pilot of steam
171 vessels. I have had a pilot's license for 30 years, but not all the time as master. Most of that time I have been engaged in navigating the Hudson River. At present I am on the Adirondack, a night boat, running between Albany and New York, going down one night and up the next. I have never had experience in fleet towing, only in navigating steamboats. I have seen the drills at Breakneck and Storm King.

Q. What do you say as to the conditions there with those drills in the river?

A. Well, I found that it has been a delay to me and my pilots in making the passage. While mostly the wind and tide would not bother us so much, it is foggy weather where we have our delay. Coming down at that place, if there wasn't anything there, very likely we might run through a bank of fog that laid there and would be delayed in getting in. I have been delayed quite a little in that way, knowing they were there and not taking a chance of going down on them. I am familiar with what is known as a gray night. I have seen, when I have been steering, what I called a gray night. Locating lights on a night of that kind, I have always found it hard to place them—a bright light and a dim light. Sometimes a bright light would not show any better than a dim one, and at times you would think you were right up on them and they would be a distance away. It is a night we have to use extra precaution.

Q. Now, in coming down there from Newburgh Bay, as you come to this place where these drills were, has it been your experience that there is trouble always in locating the lights in connection with the drills and the railroad lights and all there?

172 A. No time, only in foggy weather.

By the REFEREE:

Q. What course do your boats go through there in going south, with reference to the shore? Do you go down the middle of the river or near the west shore?

A. We usually take about the middle of the channel. We figure out. There is a difference sometimes in different boats; different captains take different courses. I usually run down till I make Polopel's Island and then I take a course from there that will run me away down to Little Stony Point——

Q. How far from the west shore would you run in going down?

A. I would answer that about where the first drill used to lay, that is about our course. It run us off when that west drill was

there, we had to make our course a little further off to go between the two of them. We follow the same course whether the tide is flood or ebb; make no difference with the tide, unless on making the turn at Polopel's Island, if it is thick weather we will run close to the Island—closer on flood tide than ebb tide. We run altogether on compass courses in that part of the river.

Cross-examination.

By Mr. KINDLEBERGER:

Q. Captain, you do not call it a gray night when you can see lights a good mile away, do you?

A. Yes, I would consider it a gray night when a light could be seen a mile away, but it would be an indistinct light that you couldn't place very good.

Q. How about two miles?

173 A. I wouldn't say that I could see a light two miles any kind of a night—that is a light that would be on an obstruction in the river. I might see a high light house or lights ashore or something of that kind. Cold Spring I should think would be about three miles from Polopel's Island. I have often when I got to the Island seen the lights of Cold Spring. They are not lights in — light house, but they are bright electric lights.

Q. And haven't you, say the same time, when at Polopel's Island seen the Cold Spring lights and also the lights on those drills?

A. I can't recollect noticing anything of that kind.

By the REFEREE:

Q. You wouldn't look for those lights until you made your turn at Polopel's Island?

A. Sometimes didn't look for them till we got pretty well down. If the weather is bad we don't.

By Mr. KINDLEBERGER:

From the drills to Cold Spring I should think is a mile and a half.

Q. Now, is it not true on a so-called gray night the bright lights seem near when they are distant, but near lights never seem to be far off?

A. They are deceiving. That is all I can say about it. On a night of that kind lights are deceiving. I have had no trouble myself in passing those drills on clear nights.

Q. What do you consider these drills in connection with the Poughkeepsie Bridge? Isn't there less distance between the abutments of the Poughkeepsie Bridge than there is between these drills?

A. The position is altogether different. In Poughkeepsie 174 we have straight work, and there is hardly any trouble of striking, even in foggy weather, without seeing them at all. We can go down and find Poughkeepsie Bridge and don't feel worried about it.

Q. The distance between the abutments is less than between the drills, is it not?

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A. I don't know about that. I shouldn't think that would be so. I don't know the distance between them. It looked very close in passing. I always thought I had room to go down in there sideways between the abutments. My boat is 412 feet long.

By Mr. VAN ETTEN:

Q. As a navigator, what do you say as to navigation out of Newburgh Bay down through this narrow channel with hills on either side with these drills in there?

A. I have always found it a difficult place to navigate, and usually we are held up there more than any other place on the river.

CHARLES H. BRUDER, sworn for defendant, testified:

Direct examination.

By Mr. VAN ETTEN:

I live at Schodack Landing and am captain of the Rensselaer. For eighteen years I have been master and pilot of steam vessels, and prior to that was employed on the water; all my experience has been on the Hudson River. Haven't been on the Rensselaer all that time. I was on the Troy. Have been with the company 24 years.

Q. Have you navigated this river since this drilling plant
175 was put in at this place between Storm King and Breakneck?

A. I have done a little of it. Our pilots do the most of that.

Q. What, in your opinion, is the condition there with these drills in there? Will you just state in your own way, what the difficulties are, if there are any, or what the condition is at that point, in navigating through there in the night time?

A. The only trouble we find is in thick weather. They used to shift them around so. If they didn't shift them around we used to have a course and go down all right and we only got held up in foggy weather—didn't go down there for fear we would run afoul of them. In clear weather we was all right.

Q. Are you familiar with what has been called a gray night?

A. Oh, yes; we have lots of those. A gray night is a night that you can navigate all right, but a light doesn't show good, it is deceiving—a gray black night sometimes we call it. That means dark with a little haze mixed in with it.

Q. In coming down from Newburgh Bay, down through there, have you had any difficulty in locating the lights on the drills in connection with the shore lights and other lights?

A. Only in foggy weather.

Q. On a gray night would there be some trouble?

A. There have been nights when they didn't show good. I put in one season at fleet towing, about thirty years ago. I didn't pull the tow, I was mate of a boat. I was with Captain Pratt.

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176 Cross-examination.

By Mr. KINDLEBERGER:

Q. Do you call it a gray night when the stars are all shining?

A. There is nights with the stars shining when it is a gray night, when it will be gray right on the water. It was a gray night the forepart of last night, with the moon shining. It is not usual to have stars shining on a gray night. The pilots usually navigate these boats down on our line.

Q. And do you not attend to the details of navigation in going past these drills?

A. The only time I have anything to say in a thing of that kind is foggy nights. When I think it is not safe to go down by the drills, we hang up above.

Q. Is that the usual customary arrangement on the Hudson River with these boats?

A. I don't know what other people do.

WILLIAM VAN WOERT, sworn for defendant, testified:

Direct examination.

By Mr. VAN ETTEN:

I live in Albany, N. Y. My occupation is master and pilot on the Hudson River and has been for 21 years. At present I am pilot on the steamer Rensselaer with Captain Bruder. I was employed with the Cornell Steamboat Company about twelve or fifteen years as master of the steamer Norwich, the Adriatic and George W. Pratt and have had experience in fleet towing. In 1907 and 1908 while these drills were there I have been navigating on the Hudson
177 River in the Citizens' Line, going through there always at night time.

Q. Will you, as a navigator, state what you have found or what has been your experience in coming down the river on ebb tide at that point, if there were any difficulties there, just tell us in your own way?

A. Well, I have found it that we had to use every precaution in bad nights, or even in decent nights, when tows were coming up and the wind blowing, because the tows often times take up a good part of the space, and we had to use every precaution to get by them at that time. Our usual channel in going down through that place in 1908 was between the two drills, the one to the westward and the middle one. I have had no experience in going through there with a tow since these drills were put in there.

Q. What experience, if any, did you have in going through there with a tow before the drills were put in there? What was your course through there before the drills were placed there?

A. Well, I never did much steering in the lower end, only just excursion boats or something like that—not to take big tows through. I was working most on the other end from Newburgh up.

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Q. Are you familiar with what has been spoken of here as a gray night?

A. Oh, yes; all boatmen are. What I call a gray night would be when the sky and the water looks about alike, and the land is very hazy and it all looks very near alike. It is a very hard matter to locate lights on such a night as that.

178 Cross-examination.

By Mr. KINDLEBERGER:

Q. Now, what you call a gray night, can you often see stars shining?

A. Well, there are nights, like Captain Bruder said, that we see stars and the moon was out and yet we couldn't hardly see anything ahead, over, say a couple of lengths of our boat. We could see the shore abreast, but nothing ahead it was so gray. It wasn't foggy at that time, it was a gray night—smoke or haze whichever you might call it, but it wasn't fog. Going by these borings we never hit anything. We used every precaution because we knew they were there, and we would stop and drift by them. We did that this morning. It was bad going by there and we stopped and drifted by them. We heard their bell as we got abreast of them and went on again, but we have to use every precaution in getting by them.

Q. Any night that is not foggy you never have any trouble?

A. If there is no tow there, but if there is tows we then have to go very carefully. They don't usually ring bells when there is no fog.

HARRY S. LOUCKS, sworn for defendant testified:

Direct examination.

By Mr. VAN ETTEN:

I live in Rensselaer, and am master and pilot of steam vessels on the Hudson River, and have been for 21 years. At the present time, I am employed as captain of the Frank Jones, the Manhattan Navigation Company. All my experience has been on the
179 Hudson River navigating. I knew these drills or boring plants in the river between Storm King and Breakneck in 1907 and 1908. I passed through there every night while navigation was open.

Q. As a navigator, what do you say as to the conditions there as affecting navigation in going down there on an ebb tide?

A. It makes navigation hazardous at that point, particularly with tows, and very hazardous for passenger boats in foggy weather.

Q. On even a clear night you would say it would be hazardous for a tow?

A. Yes, sir; at any time.

Q. And relatively speaking, how did that compare with any other points on the Hudson River?

A. I think with those drills there it is the worst place on this

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end of the river. I have had experience with fleet tows, but it was before those drills were placed there.

Q. And what do you say to the danger of towing with a fleet tow through there?

A. I think it is a dangerous place at any time to handle a tow, particularly when the wind is blowing from the northwest, coming down.

Q. What was your usual course between the drills there?

A. We would usually pull down with a tow to just about abreast of Polopel's Island and then straighten down pretty close to Butter Hill and by the time we got to Butter Hill with an ordinary tow you are nearly in the middle of the river because of the set of the tide eastward. If I was pulling a tow down there I should go between the west drill and the middle one, under ordinary cir-
180 cumstances. I am familiar with what has been spoken of as a gray night.

Q. What do you say as to the conditions of a gray night in locating lights and other things?

A. Well, lights on a gray night, what we call a gray hazy night, is deceiving. It is hard work when you see a light ahead of you to tell whether it is half a mile or three-quarters of a mile off, that is my experience. While you can see abreast pretty well, because of the land, when you look ahead into space, and a light appears, it is hard work to tell just how far away it is.

Cross-examination.

By Mr. KINDLEBERGER:

The Frank Jones is a passenger boat. I have done no fleet towing in 1907 or 1908. The last I did was in 1903.

HENRY C. PRATT, recalled for defendant, testified:

Direct examination.

By Mr. VAN ETTEN:

I was a witness at the last hearing.

Q. And after the hearing you stated, I believe, that you wanted to make some correction in your testimony. Now, will you make such correction as you desire?

A. Yes. At that time I got mixed up in the numbers of these drills, the drill to the west and the next drill to the east of it that had been placed in there, and I testified, as my evidence shows, that we went closer to the east drill. What I meant to say was that we went closer to the west drill, as the rest of my evidence will show.

181 By the REFEREE:

Q. I think you said within 100 feet of the east drill?

A. I didn't mean to say so at all. I meant within 100 feet from the west drill; that is, the tugboat was 100 or 150 feet east of the west drill.

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By Mr. VAN ETTEN:

Q. Is that the correction you desire to make?

A. That is the correction I desire to make, that is what I meant to have said at that time.

Q. And what do you say was the distance you were off from that?

A. I say that we were not over 150—or 200 feet at the outside—from the west drill, the one we collided with.

Q. You made the statement that you wanted that corrected before you talked with Mr. Flemming and myself? I think you mentioned that before we saw you?

A. Yes, sir; as soon as I found the mistake was made on the record I asked to have it corrected.

PETER S. RIGHTMYER, sworn for defendant, testified:

Direct examination.

By Mr. VAN ETTEN:

I live at Schodack Landing, and am now employed by the New York Central Railroad Co. as pumper, pumping water for stations. In July, 1908, I was mate on the Steamer Pocahontas with Captain Pratt, at the time of the collision with this drill. I couldn't say whether I was in the pilot house or on deck when we went through Newburgh Bay, but at the lower end of the bay I was in
the pilot house with Captain Pratt. It was rather a dark
182 gray night I should judge. By that I mean it was hard to
distinguish those lights.

Q. And as you came down that night towards those drills, just tell us the conditions as you saw them in looking ahead?

A. Well, I recollect that Captain Pratt and I were trying with all our might to locate those drills and we could not distinguish the lights and it was impossible to locate them from where we were. I remember the tug Victoria going down there to locate the drill, as I understood. I recall a row boat.

Q. Will you describe what you saw of the row boat?

A. Saw them going with a light, and we didn't know what to make of it; that was down near where the lights were, going I think from one drill, probably to another. We simply saw the light, and we supposed it was a boat because it was moving. As we went through there I believe a steamer went down by us. There was a yacht there. With reference to the drills I think this yacht passed between us and the drills. Captain Pratt had the wheel and we were speaking about the lights and trying to locate them. We had difficulty in doing it because we couldn't distinguish the drill from the other lights. I have had some experience as a navigator before that. I held a pilot's license at that time. I had gone through there during that summer while those drills were there.

Q. Now, when you went through between those drills where did the Pocahontas go? Just tell us as near as you can where you
went with your boat?

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183 A. She went to the east of this west drill that the tow hit as they claim.

Q. And how far away from it would you say the tug was when she passed between the drills?

A. In the neighborhood of from 100 to 150 feet perhaps, as near as I could judge.

Q. Do you know what part of your tow collided with the drill or anything else?

A. I understand it was the last three boats of the tow. We didn't see it; couldn't make out, it was hearsay.

Cross-examination.

By Mr. KINDLEBERGER:

Q. When did you first make out the lights on these borings? Where was your boat when you first saw the lights on the borings?

A. Above the drill aways. I don't think half a mile, if that. In fact, we could not locate the drill until the tug went down and located it for us and then we were not half a mile away. When we located the lights on the drill we could see the Victoria's lights.

Q. You could also see the lights at Storm King too?

A. We knew she was alongside of the drill, but before that we couldn't distinguish the lights on the drills from that place—Cold Spring or other places.

Q. Couldn't you see the Victoria from the time she left you until she got down there, all the time?

A. I presume so, but still I wouldn't say.

Q. You never lost sight of the lights on the Victoria, did you?

A. No, I don't know as I did.

184 Q. You saw the Victoria stop right at the borings?

A. As soon as the red and green light showed up, we could then see and locate the drills.

Q. You saw the top light before you saw the red and green lights, didn't you?

A. I wouldn't say that I did, no, sir.

Q. When did you change your course with the starboard wheel?

A. Not until after the Victoria went down and whistled; less than half a mile above the drills I should judge. The wheel wasn't starboarded so very far, it altered her course slightly. That threw her head to the east. I suppose that drove the tail of the tow to the west.

Q. And wasn't that the case after the Victoria blew the two whistles, wasn't it then that you starboarded your wheel?

A. Yes, sir. Of course, we couldn't alter our course until we could locate the drill.

Q. And as soon as you heard the Victoria whistle you starboarded your helm?

A. Oh, the Victoria blew to the yacht.

Q. But you did, as a matter of fact, starboard your helm after you heard the Victoria whistle?

A. After we located the drill we starboarded our wheel a trifle.

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Our course as originally taken before we heard the whistles was about in line of the drill, I should judge.

Q. Now, when was it that the captain of the Pocahontas ported his wheel?

A. When she got below the drill, about 100 feet or so. I helped him. I don't remember where the first line of barges were at that time.

Q. Don't you know, as a matter of fact, that he did not
185 port his wheel until the first line of barges was right on the top of the drills?

A. Maybe so. I don't deny it because I won't remember. The yacht I think passed between us and the drills going down. I think she went to the left, if I recollect right. I am sure a yacht went by us. The Victoria blew two whistles and the yacht answered the two. I don't recollect hearing any noise when the scows hit the platform.

By Mr. VAN ETTEN:

Since the time that occurred in July, 1908, my attention has not been called to the matter until today.

LEONARD HAZARD, sworn for defendant, testified:

Direct examination.

By Mr. VAN ETTEN:

I live in the City of Kingston. My occupation is master of coasting vessels and pilot of tugboats. I have followed that since I was 9 years of age. I am now 57. I worked ashore part of that time, for the bridge company, 32 years ago this season. I worked on the Poughkeepsie Bridge when they built that; I put up all the rigging on the scows when they first went there. The lights on the bridge now are a red light on each end of the abutment and a green light in the center of the span—bright. In July, 1908, on this night in question, I was pilot on the Victoria.

Q. Had you been connected with the location of any of those borings there?

186 A. In 1907, in the fall, after the Victoria laid up, I waited on the drills and shipped them out of there on the tug J. G. Rose. We took them away that fall and put them in the tow for New York.

Q. Will you please describe how those drills were anchored?

A. They were anchored up and down the river; they were anchored with long lines.

Q. Now, how close could you get to them with a tug boat?

A. Well, you could lay in alongside of the drill, but couldn't start away without hitting the cable.

Q. Tell us just what you did there—what you know about those cables?

A. Well, when I took those drills away that fall they shipped a cable there.

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By the REFEREE:

Q. The cables were left there, were they?

A. Yes, sir, they slipped them there, and they were left there for the winter, I suppose. It was not buoyed; they let it sink. They were wire cables. Two men took a location and observations where they were sinking them to lay up and charted them.

By Mr. VAN ETTEN:

Q. And were the same platforms put back again the next spring?

A. I suppose so, I didn't see any difference. I didn't put them back there the next spring, but I saw them going by there every day or so, and they were the same character of platforms and the same size.

Q. Now, tell us how near you can get to one of those platforms with a boat drawing six or eight feet of water?

187 A. I wouldn't want to run within fifty feet of the cables.

Q. How near could you go? How close to the platform could you go with a boat drawing six or eight feet of water?

A. Well, the platform was on the end of the float. Here (ind.) was the cable and here was the platform. There were four anchors on the barge, one from each corner, two up the river and two down; not straight up the river, off in that direction (ind.).

Q. Now, in passing down along here alongside of this platform how near could you go with a boat drawing six or eight feet of water?

A. In the neighborhood of 40 to 45 feet—couldn't go closer than that. They were very long leads to these cables. I don't know how far off the anchors lay. I didn't lay the anchors. I was on the Victoria on the night of the collision in question, and remember that we went down around the drill and headed up. I saw no other boat there but the steam yacht. I sat in the pilot house. I wasn't on watch. Captain Walker was the pilot on watch. I saw the manner in which the tow collided with this plant. From where I was we didn't really hit the drill at all. Some of those canal boats hit the cable; you see they don't fasten close together. Three tiers went clear.

Q. Did you go alongside of the tow afterwards?

A. We stopped to see if the drill was all right, and everything was all right then and we went for the tow. I was not on duty at that time. I was simply a passenger.

188 TIMOTHY DONOVAN, sworn for defendant, testified:

Direct examination.

By Mr. VAN ETTEN:

I live at Kingston, New York. My occupation at present is master and pilot of steam vessels. I have been a pilot since 1882 and master of steamboats for the last seventeen years. Before that I was employed on coast wise vessels, schooners and sloops, on the Hudson River and Long Island Sound. Since I have been a licensed man

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I have navigated the Hudson River and in 1908 I was so engaged on the new towboat Cornell, the largest and most powerful boat the Cornell Company have, as master, and I am now. She is five years old. In 1908 we took the tows from New York up until we met the down tow, that left Albany the previous night and changed sometimes in the vicinity of Poughkeepsie, Marlborough and Esopus. We went from New York one night and returned the next night, and each time had a tow; so I am familiar with towing through this drill plant there.

Q. Do you remember in July, 1908 an additional drill or boring plant being put in there?

A. Yes, I remember when the drill was put in, but I couldn't say just what date it was, and I called our company's attention to the fact.

Q. Now, as a navigator, will you tell us about towing with a fleet tow through the Newburgh Bay and this place here where these drills were?

A. You want me to give my opinion as to whether I consider it dangerous or not?

Q. Well, as a navigator, I want your experience and your opinion based upon that experience?

189 A. Well, when the four drills were there I numbered them, from east to west, 1, 2, 3 and 4. That number three when that was placed there, it was absolutely unsafe at any condition of weather, in my opinion. It wasn't absolutely safe at no time, day or night, with the tows that we pulled down through there.

Q. Do you know what a gray night is, so-called?

A. I don't know what a gray night is unless you call it a night that we often see when we can see a light ashore, or maybe on both sides, if the river isn't too wide, but you can't see any great distance ahead.

Q. How about distinguishing distances ahead of you that lights are—that is, whether one is further off than another?

A. Yes, and often times lights haven't the same candle power. Lights placed in the same position, one light would show up to you a long while before the other one would, and in coming towards those lights it would be pretty hard to tell which light you are nearest to. The light that would show the strongest to you might be the furthest away when you come to get close up to them.

Q. Now, tell us the usual course a tow going through there would take before there were any drills put there?

A. Well, all I can speak is for myself in that and boats I went on. The course of the tow would be shaped, would depend on conditions; the direction and force of the wind, the condition of the tide, and the weight and draft of the tow that you had to pull.

Q. On an ordinary ebb tide, with a little or no wind, what
190 would be the usual course in going through there with a tow of about 27 boats, before the drills were there?

A. Well, the usual course would be straight on down the river until you got so you could open up the whole of the Warrigot and

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head down past the easterly extremity of Butter Hill, anywheres from 700 to 1200 feet off west shore.

Q. And after the drills were put there what was the usual course, between what points.

A. After the drills was put there, why, then you were up against the real thing. There wasn't any choice about it that I could see. Before they put the fourth drill in we selected what we called the middle.

Q. That is between the one next to the west shore and the one next to it?

A. Yes, sir; the one we call 21, to the westward.

Q. And 20?

A. Numbering them from east to west, 1, 2 3—that is, the drill that was put in in 1908; 4 is the westerly drill. Before that drill number 3 was put in there we selected that passage between 2 and 4. That is between 20 and 21 as shown on map. Before that number 3 was put in there the usual course was through the middle. After that was put in there then we tried all kinds. I tried to get out going down through there, and I went to the eastward and I went to the westward. I went down to the eastward and one time in particular when I couldn't make out the lights on the drills, when I couldn't satisfy myself that the lights was right, and there was nothing to do but to get through there, and we went through to the eastward following down along that shore.

191 Q. After the 3rd drill was put in there you have described, on one occasion you went through to the eastward, and on some other occasion you went to the west, but I asked you the usual course as you observed it in going through there?

A. Right between that No. 3 and 4; between hole 21 and 23.

Q. Now, with a tow going through there just describe what would be the difficulties in navigating through there, from your experience.

A. Well the difficulties would be just that obstruction right in you- way, and it would be up to you to get clear of it, if you could.

Q. As compared with other parts of the river that you navigated with that boat, what would you say as to this place?

A. Well, that would depend a great deal on conditions; if it was a favorable night or a clear day, the conditions would not be so hard to get through there as if it was a hazy night and you couldn't see lights any distance, for the reason that if you could see that light any distance beyond the drills you could get some kind of a range on that light, or that mark that would bring you through there. Without that, it would be impossible to go through there with any degree of safety whatever, unless you could get yourself in the proper course of the tide.

Cross-examination.

By Mr. KINDLEBERGER:

Q. Now, if you do see the lights beyond, that gives you some kind of a guide as to where the other lights are, doesn't it?

A. If you could see the lights beyond them away from you, it would help you.

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192 Q. So that on a night when you could see the lights at Cold Spring beyond and also these boring lights, then it would be easier than if you could not see the Cold Spring lights, wouldn't it?

A. You would have better guard, but I wouldn't consider it easy at no time, even with that. That would probably help you some, but would not help you to get in to the set of the tide.

Q. Isn't there a great deal of difference in towing, according to the number of boats you have in the tow?

A. Well, I suppose the more boats the more weight.

Q. And if you have five boats it is a great deal easier to manage than if you have fifty boats in one tow, is it not?

A. Not always.

Q. I mean five boats are not apt to swing so much with a change in the course of the tug as fifty boats are?

A. Five boats would swing a whole lot more. It wouldn't be easier to keep them from swinging by managing your tug.

Q. If the fifty boats once started to swing it would be harder to stop them, than if you had five boats?

A. Well, if you have 50 boats, and the first place, to make them swing there must be some power ahead.

Q. And assuming the tug does change its course and the 50 boats start to swing, isn't it very much harder to stop that swing with fifty boats than if five boats were taking the same swing?

A. That is a kind of question that I don't understand. If

193 you pull fifty boats along like that and running parallel with the tide and you change your course a little bit, you are not affecting the tail of that tow but very little, and you wouldn't be apt to throw the tail of that tow much closer to the—because when you are pulling it this way you would be going that much faster through the water, and when the boat pointed a little bit it would be moving away from that point.

By the REFEREE:

Five boats wouldn't be much of a tow for our tug. I would not want to hook on to five boats and depend on straightening them up when you got swinging because I don't think there would be much of the five boats left. It would depend on how far astern they were.

By Mr. VAN ETTEN:

Q. What is the usual tow of a Hudson River fleet tow, ordinarily?

A. For our boat I would consider a pretty fair tow anything between five and fifteen thousand tons. The boats run from 400 to 1,000 tons, and the draft is from 8 to 22 feet.

Q. We are asking you about the number of boats in the average fleet tow on the Hudson River?

A. In the Cornell Line our average number last season was about eighteen to twenty heavy boats. In a canal boat tow I wouldn't consider 50 boats too heavy a tow for the Cornell; or as many as you can put on for that matter, if you take the drills out of the way.

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By Mr. KINDLEBERGER:

When we have those tows we don't carry any helpers, except to land boats and pick up boats, and they direct that from the
194 office. We never figure on helpers. The Pocahontas has no where near the power of the Cornell.

A. I answered that question in general for Mr. Van Etten. I wouldn't think eighteen canalboats a pretty fair tow for a boat like the Pocahontas.

Defendant rests.

DANIEL LYNN, sworn for plaintiff, in rebuttal, testified:

Direct examination.

By Mr. KINDLEBERGER:

I am Fire Patrolman and work for the State of New York at Raquet Lake, New York, in the Adirondacks. I was formerly employed by the Phœnix Construction Company. On the night of Sunday, July 19, 1908, I was diamond drill man on scow C, and in charge of the work. I had assisting me Bob Young and Charlie Grover, both of Cornwall.

Q. Now, about 9 or 9:30 of the evening of that day, will you just describe what happened, in your own way?

A. Well, we were working there with this boat, and I was putting down the wash rods to wash out the hole, and I was running the hoister and Bob Young and Charlie Grover they were putting the pipes together, working on the platform. What attracted my attention was a tug coming down on the west of us. I didn't know at that time what tug it was, but I afterwards found out it was the Victoria. I see her coming and I didn't pay much attention to it until I noticed it come up behind us and up to the barge. I
195 spoke to the captain, said "Hello, Captain, what is wanted?" He said, "There is a tow coming through here, and I've come down to help it through." The tug wasn't fast to us. I saw the tow coming down. As I looked at it, I thought it was coming to the west of us, from the way it looked. The lights looked up the river—could see the tow lights plain. The Victoria blowed two whistles and I turned and looked up and I see the other boat—what I took to be the other tug—answer her, but I wouldn't say that it was the other tug that answered, but I took it to be. The other tug swung right along to the left, towards the middle of the river, and I turned to him and I said, "What in hell did you do that for? That tow is going to hit us." The tow when I said this was between a quarter and half a mile away. It didn't come straight down, it kept coming sideways to us then, on kind of a 45 degree, I should think—or whatever degree it was, it was coming slanting. I told Young and Grover to get the wrenches and tools off the platform, and we got off the platform and come onto the scow C, and the captain asked us if we had a rowboat and I said yes, and he said, "Then you'd better get in her." We got into the rowboat and rowed out 40 or 50 feet to the west of scow C. Then the tug and tow come down,

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floated along down and struck the scow C and bumped along on that, and then struck the platform and smashed that. There was a very loud noise, breaking of timbers and boards and ripping them up, and the women was hollering. I didn't notice any more whistles there at that time. He might have blown whistles, but I
196 didn't pay much attention to anything else; I was watching the boat. We had three lights on scow C.

Cross-examination.

By Mr. VAN ETTEN:

I never had any experience in navigation. I am not a licensed man. The blowing of the two whistles caused me to make the remark, "What did you do that for?" to the captain of the Victoria. I don't know as he answered me when I asked him that. I understood the blowing of the two whistles meant for the tow that was coming to go to the left. I don't remember any steam yacht, or any other vessel, outside of the tow, going through there. When I looked up at the tow I saw the head lights on the tug and the lights on the tow. I saw the big head light on the tug and the lanterns on the staff. I don't know as I saw the red or green light. I didn't take no notice. I can tell in the night time which way a boat is navigating, if I can't see her red or green lights. If I see a light coming towards me and it swings to the right, I think I can tell which way it is coming—if I see the headlight. I heard the boats rake against the platform. The platform was under the drill. At that time the platform was above the deck of the scow. It depended a good deal on the tide. Sometimes it was very near level with the top of the scow, and other times it was three feet above. I know how these scows were anchored there; sometimes there was two on a corner—went off at each corner and up the river, and the same down. I don't know just how far out they were; they were about 400 or 500 feet long. Sometimes they were longer and sometimes shorter.

197 It is conceded by defendant's counsel that the map produced by plaintiff shows a width of over 600 feet of westerly channel, and over 400 feet at the other channel of water, 25 feet in depth in the easterly channel and 30 feet in the westerly channel.

Rest all.

Testimony closed.

198 *Notice of Appeal.*

Supreme Court, New York County.

Action No. 2.

PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
vs.
CORNELL STEAMBOAT COMPANY, Defendant.

SIRS: You will please take notice that the defendant herein, the Cornell Steamboat Company, hereby appeals to the Appellate Di-

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vision of the Supreme Court of the State of New York, First Department, from a judgment made in this action and entered in the office of the Clerk of the County of New York on the 6th day of September, 1910, which judgment determines that the plaintiff recover from the defendant the sum of Four Thousand Four Hundred Thirty-two and 52/100 Dollars ($4,432.52) being the amount of damages, interest and costs, and prays that said judgment may be in all things reversed and set aside.

Dated, September 24th, 1910.

Yours, etc.,

AMOS VAN ETTEN,
Attorney for Defendant-Appellant,
22 Ferry Street, Kingston, N. Y.

To E. Crosby Kindleberger, Esq., Attorney for Plaintiff; William F. Schneider, Esq., County Clerk of New York County.

198*a* *Cross Notice of Appeal.*

Supreme Court, New York County.

Action No. II.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
vs.
CORNELL STEAMBOAT COMPANY, Defendant.

SIRS: You will please take notice that the plaintiff herein, the Phœnix Construction Company, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, First Department, from so much of the judgment made in this action and entered in the office of the clerk of the County of New York on the 6th day of September, 1910, as determined that the plaintiff is entitled to recover but $4,000.82 together with interest and costs, instead of the sum of $14,785.82 with interest and costs, the sum of $10,785.00 being the amount found by the Referee to have been the profits which the plaintiff would have been entitled to receive under its contract if it had been permitted to have completed the same, and
198*b* prays that said judgment may be increased by the addition of said sum of $10,785.00.

Dated September 30, 1910.

Yours, etc.,

E. CROSBY KINDLEBERGER,
Attorney for Plaintiff.

Office and Post Office Address, No. 2 Rector St., Borough of Manhattan, New York City.

To Amos Van Etten, Esq., Rondout, N. Y., Attorney for Defendant.

To William F. Schneider, Clerk New York County.

199 *Summons.*

Action No. 2.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
against
THE CORNELL STEAMBOAT COMPANY, Defendant.

Trial desired in New York County.

To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, New York, May 17th, 1910.

E. CROSBY KINDLEBERGER,
Plaintiff's Attorney.

Post Office Address and Office, No. 32 Franklin Street, Manhattan, New York City.

200 *Complaint.*

Supreme Court, New York County.

Action No. 2.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
against
THE CORNELL STEAMBOAT COMPANY, Defendant.

The complaint of The Phœnix Construction Company, the plaintiff above-named, against the defendant, above-named, alleges as follows:

I. The plaintiff is a corporation duly organized and existing under the laws of the State of New York, having its principal office and place of business in the City and County of New York.

II. On information and belief that the defendant above-named is a corporation organized and existing under the laws of the State of New York, having its principal office and place of business in the City of Kingston, County of Ulster.

III. That on the 28th day of October, 1908 and prior thereto, the plaintiff was lawfully and peaceably engaged in the performance of work upon the waters of the Hudson River opposite Storm King in boring test holes in the bottom of said Hudson River. That said work was being prosecuted by this plaintiff pursuant to employment by the Board of Water Supply of the City of New York, which

board was authorized, as plaintiff is informed and verily be-
201 lieves, by the laws of the State of New York to determine at what place it should construct an aqueduct or tunnel under the bed of the Hudson River to allow waters accumulated on the west side of said Hudson River to pass to the east side of said Hudson River and thus be conveyed to and distributed among the inhabitants of the City of New York.

IV. On information and belief, that said Board of Water Supply of the City of New York obtained from the Secretary of War of the United States, who by Act of Congress duly made and enacted, is given jurisdiction of the premises, a permit to make certain borings at various lines in the Hudson River to drive piles and anchor vessels, said permit having been granted February 21, 1906 and modified on March 22, 1907 and further modified on February 24, 1908, and, as so modified, was in full force and effect on October 28, 1908.

V. Plaintiff commenced the work of boring at Storm King on September 10, 1906, and, as plaintiff is informed and verily believes, prior to said time said Board of Water Supply of the City of New York notified the defendant as well as owners of all vessels frequently passing said borings that said work was to be carried on in that vicinity.

VI. That said work of boring pursuant to such permit was being carried on by this plaintiff on the night of October 28, 1908, there being at that time three borings in progress, known as borings Nos. 20, 21 and 23 respectively. All of said borings were on a line,
202 boring No. 21 being the furthest west; boring No. 23 being about five hundred and seventy-five (575) feet to the eastward of boring No. 21 and boring No. 20 being to the eastward of boring No. 23, and about twelve hundred (1200) feet from the east shore of the Hudson River. The river was wholly unobstructed between boring No. 20 and the east bank of the Hudson River. That at said time there were on said Hudson River at said borings two channels; one over twenty-five (25) feet in depth at mean low water with a width of over four hundred (400) feet and the other of over thirty (30) feet in depth at mean low water with a width of over six hundred (600) feet in the clear, as provided in said permit of the War Department of the United States as modified on said 24th day of February, 1908. There were scows or pile drivers at each of said borings, and watchmen thereon attending to their duties and proper lights displayed on said scows, pile driver and borings as required by law. Scow A was attached to said boring No. 23. Each of said borings were composed of various lengths of wrought iron piping and boring No. 23 had attained a depth of five hundred fifty-two (552) feet below the surface of the water of the Hudson River at the time of the happenings hereinafter described.

VII. On information and belief that on the night of October 28 1908, and about the hour of nine o'clock, the tide being ebb, the night rainy but not foggy, and with only a light air blowing from the north, the steamtug Osceola, owned and operated by the defendant was towing a large number of canal boats down the Hud-

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son River while the steamtug Primrose, also owned and op-
203 erated by the defendant, was present at the same time. The tug Osceola first headed as if to pass to the eastward of boring No. 20, where there was more than ample room for the tow to pass. About a half mile above the borings when below Cornwall, while the tug Primrose was to the east side of said tow, the tug Osceola negligently changed her course as if to pass to the westward of boring No. 23. Those on board said steamtugs failed to correctly calculate the effect of the tide. Said steamtug Osceola failed to change sufficiently her course and said tug Primrose failed to properly assist in changing the course of said tow, for while said tug Osceola passed said borings in safety, the canal boats were caught by the ebb tide, turned partly broadside across the river, and the fore part corner of one of the canal boats back of the middle of the tow, violently struck scow A and boring No. 23, breaking the anchor lines, bending the platform and pipe over so that the same could no longer be seen above the water. The steamtug Primrose wholly failed to push the said tow to the westward and exerted no power prior to the accident until she began to back away from the tow at a moment immediately preceding the accident.

VIII. On information and belief that the damage to said boring was not caused or contributed to by any negligence of this plaintiff, its agents, servants or employés, but was wholly caused by the negligence and carelessness of the defendant, its agents, servants and employés on board said steamtugs Osceola and Primrose.

IX. By reason of the said canal boats drifting against and
204 over said boring No. 23 as aforesaid, a large part of the piping in said boring, six mushroom anchors, two stone anchors, eight anchor lines each five hundred (500) feet in length, were wholly lost, scows A and B with their crews were required for five days in clearing up the wreck; a diver was employed, tug hire expended, scow A was slightly damaged and this plaintiff was prevented from completing the boring by drilling four hundred forty-eight (448) feet as authorized by a contract with said Board of Water Supply, losing the compensation which would have been due under said contract for said work, less the expense for such drilling. The total amount of said damages as aforesaid, giving credit for the pipe recovered is the sum of Twenty thousand, five hundred sixty-seven and 62/100 ($20,567.62) dollars, no part of which has been paid, although due demand therefor has been made of the defendant.

Wherefore, plaintiff demands judgment against the defendant above-named for the sum of Twenty thousand five hundred sixty-seven and 62/100 ($20,567.62) dollars, together with interest thereon from the 28th day of October, 1908, together with the costs of this action.

E. CROSBY KINDLEBERGER,
Attorney for Plaintiff.

Office and P. O. Address, 32 Franklin Street, Borough of Manhattan, New York City.

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205 STATE OF NEW YORK,
County of New York, ss:

Francis W. Belknap, being duly sworn, deposes and says: That he is the Secretary of The Phœnix Construction Company, the plaintiff above-named. That he has read the foregoing complaint and knows the contents thereof, that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

That the reason why this complaint is not verified by the plaintiff is that said plaintiff is a corporation, and that deponent verifies the same as an officer of said corporation, and from knowledge and information derived from statements made to him by officers and agents of said plaintiff and from his personal knowledge of the business and affairs of said corporation.

FRANCIS W. BELKNAP.

Sworn to before me this 14th day of May, 1909.
ARTHUR C. HUTCHESON,
Commissioner of Deeds,
City of New York.

206 *Answer.*

Supreme Court, New York County.

Action No. 2.

PHOENIX CONSTRUCTION COMPANY, Plaintiff,
vs.
CORNELL STEAMBOAT COMPANY, Defendant.

The defendant, Cornell Steamboat Company, for answer to the complaint of the plaintiff in this action, respectfully alleges and shows to the Court:

First. It is admitted that the plaintiff is a corporation of the State of New York as alleged in the complaint.

Second. It is admitted that the defendant is a duly organized domestic corporation of the State of New York, having its principal office and place of business in the City of Kingston, Ulster County New York.

Third. It is admitted that on the night of October 28, 1908, at about nine o'clock, the tide being ebb and the night rainy, a canal boat in tow of the steamtug "Osceola," then owned and operated by the defendant, came in collision with a boring machine of the plaintiff in the navigable channel of the Hudson River, at or near Storm King and Breakneck Mountains, damaging such machine.

207 Fourth. Upon information and belief this defendant denies each and every of the allegations of the complaint other than as above admitted.

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Fifth. Upon information and belief this defendant denies that such collision was caused by any negligence on the part of the defendant, its agents or servants operating said steamtug; but alleges that whatever damage the plaintiff sustained was caused by the negligence of the plaintiff, its agents, servants or employees.

Sixth. Upon information and belief this defendant repeating all the allegations hereinbefore stated as if the same were here re-stated and re-alleged, alleges that the structure of the plaintiff was unlawfully placed in the navigable waters of the Hudson River, and that the plaintiff at the time of said collision was unlawfully, improperly and unnecessarily interfering with the navigation upon the Hud-on River, such river being one of the navigable streams of the United States, in the State of New York.

Wherefore, this defendant prays judgment dismissing the complaint of the plaintiff, with costs of the action.

AMOS VAN ETTEN,
Attorney for Defendant.

Office and P. O. Address, 22 Ferry Street, Kingston, N. Y.

STATE OF NEW YORK,
County of Ulster, ss:

S. D. Coykendall, being duly sworn, deposes and says, that he is the President of the Cornell Steamboat Company, the de-
208 fendant in this action; that he has read the foregoing answer and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

Deponent further says, this verification is made by him because the defendant is a corporation and deponent is an officer thereof, to-wit: President.

S. D. COYKENDALL.

Sworn to before me this 26th day of June, 1909.

HERMON T. WOOD,
Notary Public.

Stipulation as to Appointing Referee.

Supreme Court, New York County.

Action No. 2.

PHOENIX CONSTRUCTION COMPANY, Plaintiff,
vs.
THE CORNELL STEAMBOAT COMPANY, Defendant.

The Clerk of the County of New York, having hereto on October 4, 1909, made an order pursuant to stipulation signed by
209 the attorneys of the parties herein, appointing Harrington Putnam, Esquire, Referee in the above entitled case, pursu-

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ant to Section 1011 of the Code of Civil Procedure of the County of New York, and said Harrington Putnam, being thereafter disqualified to act as such Referee, by being appointed a Justice of the Supreme Court of the State of New York;

Now, pursuant to the provisions of Section 1011 of the Code of Civil Procedure of the State of New York, it is hereby stipulated and agreed by and between the attorneys for the plaintiff and defendant in the above entitled action that the said action, now pending in this court, to recover damages for the alleged negligence of the defendant, and now being on the Trial Term Calendar of this Court of the County of New York, numbered 5667, be referred to Charles F. Brown, Esquire, Attorney and Counselor at Law, of No. 60 Wall Street, in the County of New York, to hear and determine all the issues in said action, both of fact and of law and to exercise all the powers of a referee set forth in the Code of Civil Procedure.

It is further stipulated that an order carrying out the terms of this stipulation be entered without further notice.

Dated, December 17, 1909.

E. CROSBY KINDLEBERGER,
Attorney for Plaintiff.

AMOS VAN ETTEN,
Attorney for Defendant.

210 *Order Appointing Referee.*

Supreme Court, New York County.

Action No. 11.

THE PHOENIX CONSTRUCTION COMPANY, Plaintiff,
vs.
CORNELL STEAMBOAT COMPANY, Defendant.

Upon reading and filing the annexed stipulation signed by the attorneys for the parties hereto, consenting to the appointment of Charles F. Brown, Esquire, Attorney and Counselor at Law, as Referee to hear and determine all the issues in the above-entitled action, and that an order appointing said Mr. Charles F. Brown may be entered without further notice, upon motion of E. Crosby Kindleberger, Attorney for the plaintiff herein, it is

Ordered, that Charles F. Brown, Attorney and Counselor at Law of No. 60 Wall Street, Borough of Manhattan, City of New York be and he hereby is appointed Referee to hear and determine the whole issues in the above entitled action, both of fact and of law and to render his decision upon the same, and file it with the Clerk of this Court, and to exercise all the general powers of a Referee as prescribed by the Code of Civil Procedure.

Dated, New York, December 17, 1909.

PETER J. DOOLING, *Clerk.*

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211 *Decision.*

Supreme Court, New York County.

Action No. II.

PHOENIX CONSTRUCTION COMPANY, Plaintiff,
vs.
CORNELL STEAMBOAT COMPANY, Defendant.

To the Supreme Court of the State of New York:

Pursuant to an order of this court entered herein on the 17th day of December, 1909, referring it to me to hear and determine the whole issues in the above entitled action both of fact and of law and to render my decision upon the same, and to exercise all the general powers of a referee prescribed by the Code of Civil Procedure, I, the undersigned as referee report: That the parties whose interests could be affected by the result of the reference being corporations and present by attorneys, the referee's oath was expressly waived. I thereupon heard the allegations and evidence of the parties being attended by E. Crosby Kindleberger, Esq., of counsel for plaintiff and by Amos Van Etten, Esq., and Harry H. Flemming, Esq., of counsel for defendant.

Now after hearing E. Crosby Kindleberger, Esq., attorney for the plaintiff and Amos Van Etten, Esq., attorney for the defendant, and due deliberation having been had, I decide and find as follows:

212 *Findings of Fact.*

I. The plaintiff is a corporation organized and existing under the laws of the State of New York, having its principal office in the County of New York.

II. The defendant is a corporation organized and existing under the laws of the State of New York, having its principal office in the County of Ulster, City of Kingston.

III. Prior to and at the time of the collision, the subject of this action, the Board of Water Supply of the State of New York under authority of a statute of the State of New York, was engaged in making test borings in the bed of the Hudson River near Storm King.

Except.

IV. That the making of such test borings was part of a great public improvement to wit, a part of the work of the construction of an aqueduct to supply the inhabitants of the City of New York with pure water.

Except.

V. That the Board of Water Supply of the City of New York, prior to the happening of this collision, had duly made a contract

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with the American Diamond Rock Drill Company, that said contract was thereafter modified and that thereafter said contract was duly assigned to this plaintiff by the American Diamond Rock Drill Company, such assignment receiving the consent of the Board of Water Supply of the City of New York.

Except.

213 VI. That after the contract had been assigned to the plaintiff, the plaintiff proceeded with the work of making these test borings at Storm King aforesaid, using its own plant and employing its own workmen.

VII. That thereafter and prior to the happening of this collision, the Board of Water Supply of the City of New York made a further modification of this contract by agreement with the plaintiff.

Except.

VIII. That prior to the making of the test borings the Board of Water Supply of the City of New York made an application to the Chief of Engineers of the United States Army to drive pipes and anchor vessels near New Hamburg and that the granting of this application was recommended by the Chief of Engineers of the United States Army, and permission to do this work was granted by Robert S. Oliver, Acting Secretary of War on the 2nd day of February, 1906.

Except.

IX. That thereafter application was made by the Board of Water Supply of the City of New York to change the location of the borings from New Hamburg to Storm King and on the 22nd day of March, 1907, Colonel Lockwood of the Corps of Engineers of the United States Army wrote the Board of Water Supply of the City of New York that by the authority of the Secretary of

214 War the permit of July 2nd, 1906, was modified so as to permit the work to be carried on at Storm King.

Except generally and specifically.

X. That on the 24th day of February, 1908, Colonel John G. D. Knight of the Corps of Engineers of the United States Army, signed a letter granting permission to the Board of Water Supply of the City of New York to anchor vessels at the Storm King line. In the said letter it was provided that there should not be in progress simultaneously on said line, more than four borings, and that there should be left unobstructed during the progress of the boring work two channels, one of at least 25 feet depth at mean low water with a width of at least 400 feet in the clear, and the other of at least 30 feet depth at mean low water and with a width of at least 600 feet in the clear.

Except generally and specifically.

XI. That at the time of the happening of this collision there was to the west of boring No. 21, a channel over six hundred feet in width and of a depth of at least thirty feet at mean low water and between borings 21 and 23 there was a channel at least 400 feet in width of water at least 25 feet in depth at mean low water.

Except.

XII. That the channels here above described in the XI finding

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were sufficient for the passage of vessels and tows and that a large number of tows and vessels had safely passed through said channels between the borings during the years 1907 and 1908.

Except.

215 XIII. That prior to the collision, the defendant had been notified of the location of each of the vessels of the plaintiff at each of the borings.

Except.

XIV. That the defendant was familiar with the position of the vessels of the plaintiff at each one of the borings.

Except.

XV. That officials of the United States Government had prescribed that during the night, white anchor lights should be maintained upon each vessel located at each of the borings.

Except.

XVI. That on the night in question the plaintiff maintained proper and adequate white lights upon each one of its vessels located at each one of the borings.

Except.

XVII. That on the night on which the collision occurred the lights maintained by the plaintiff in each of its vessels located at the respective borings were visible for a distance of several miles and were seen by the captain of the defendant's tug Osceola when said tug was over a mile away from the boring.

Except.

XVIII. That on the night of October 28, 1908, the following borings were in position on the line at Storm King: Boring No. 21 which was 718 feet from the west shore of the Hudson

216 River; boring No. 23 which was 599 feet east of boring No. 21; boring No. 20 which was 242 feet east of boring No. 23 and about 1,260 feet west from the east bank of the Hudson River.

Except.

XIX. The following vessels of the plaintiff were located at the following borings on the night of October 28, 1908: Boring No. 21, Pile Driver No. 1; Boring No. 23, Scow A; Boring No. 20, Scow B.

XX. That each of these vessels mentioned in Finding No. XIX, was securely anchored with their bows and sterns up and down stream, and their position was fixed.

XXI. That boring No. 23 was composed of iron pipe of various sizes, the smallest of which had attained a depth of 552.2 feet below the surface of the water at the time the collision occurred.

XXII. That on the day of the collision, the plaintiff was engaged in sinking iron pipe into the bed of the Hudson River.

XXIII. That prior to the collision and during the month of September, 1908, certain correspondence passed between the plaintiff and defendant, that on or about the 8th day of September, 1908, the plaintiff removed boring No. 22 from the river, thus leaving a third channel of water 20 feet deep between 500 and 600 feet in width.

Except generally and specifically.

217 XXIV. That after the removal of boring No. 22, and before the happening of this collision the defendant informed

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the plaintiff that it would instruct its captains to use as far as possible the channel to the east of boring No. 20 referred to in Finding No. XXIII.

Except generally and specifically.

XXV. On the night of October 28, 1908, at the time the collision occurred the tide was running strong ebb, there was practically no wind, what wind there was being from the north and northwest. The water was smooth and the night was rainy.

Except.

XXVI. That at and near boring No. 23, the ebb tide sets towards the east with a tendency to carry vessels and other objects in a southeasterly direction.

Except.

XXVII. That the tug Osceola owned by the defendant was the leading tug of the defendant's tow that collided with Boring No. 23 on the night of October 28, 1908.

XXVIII. That the tug Osceola was a large tug and of considerable power.

XXIX. At the back of the tug Osceola at the time of the accident were two hawsers, one on each outside boat of the head tier of the tow. These hawsers were each 600 feet in length.

218 XXX. That the tow was made up of twenty-four canal boats, four constituting each tier and there being six tiers.

XXXI. That the average loaded canal boat with its cargo weighed three hundred tons.

Except.

XXXII. That the tow was about 90 feet wide and the entire length of the tow including the hawser, tug and canal boats was about 1,300 feet.

Except.

XXXIII. That in changing the course of a loaded tow time must be given to shape the course.

Except.

XXXIV. That the tug Osceola passed the borings about one hundred feet west of boring No. 23.

XXXV. That the laying of the course of the Osceola so that she passed so close to boring No. 23, was an act of negligence, which contributed to the happening of the collision.

Except.

XXXVI. That shortly before the collision the Osceola changed her course to go to the westward and in so doing caused the ebb tide to swing her tow to the eastward.

Except.

XXXVII. That in changing the course of the Osceola to
219 the westward and in permitting her tow to swing to the eastward, the captain of the Osceola committed an act of negligence, which contributed to the collision.

Except.

XXXVIII. That the captain of the Osceola did not sufficiently allow for the effect of the ebb tide.

Except.

XXXIX. That the captain of the tug Osceola was also negligent in failing to give timely signals to the Primrose, owned by the defendant, and in failing to take measures to push the rear of the tow over towards the west.

Except.

XL. That the captain of the tug Primrose was also negligent in failing to give timely signals to the Osceola and in failing to take timely measures to push the tail end of the tow towards the west.

Except.

XLI. That the port side midships of the canal boat O. F. Hawley, which was in the third tier from the front of the tow, struck boring No. 23.

XLII. That the force of the collision broke a plank on the canal boat O. F. Hawley and drove scow A considerably to the south and east of its former position.

Except.

XLIII. That the force of the collision entirely carried away the pipe which composed boring No. 23, breaking the same at a
220 point about four feet beneath the top of the bed of the river at about 80 feet below the surface of the water.

Except.

XLIV. That a search made by an expert diver failed to show the presence of the pipe within the radius of a hundred feet from where it formerly had been.

Except

XLV. That where the pipe had been broken as described in Finding No. XLIII the various sizes of pipe were flat and bent over.

Except.

XLVI. That as the result of the collision a large amount of drive pipe was lost of the value of $3,040.37.

Except.

XLVII. That as a result of the collision, anchors were lost, also anchor lines, diver's expenses and wages were incurred, tugs were hired, a skiff was damaged, telephone calls were required and the use of Scows A and B with their crews were required for five days for cleaning up the wreck.

Except.

XLVIII. That the total damages sustained by the plaintiff from the collision for the items mentioned in the Findings XLVI and XLVII were $4,000.82.

Except.

221 XLIX. That as a result of the collision it became necessary for the plaintiff to abandon further work under its contract with the Board of Water Supply of the City of New York upon boring No. 23.

Except.

L. That under the contract between the plaintiff and the Board of Water Supply of the City of New York, the plaintiff was entitled to proceed with boring No. 23 until a depth of one thousand feet below the surface of the water should have been reached.

Except.

LI. That for the 552.2 feet which had been already attained at the time of the collision, the cost to the plaintiff had been $10,880.00, and the plaintiff has been paid by the Board of Water Supply of the City of New York $11,820.00.

Except.

LII. That the total contract price for the entire 1,000 feet was $32,105.00.

Except.

LIII. That the compensation of the plaintiff was so arranged at the beginning of the work, that the expenses of performing the work at the beginning were greater than the compensation provided for in the contract for that part of the work.

Except.

222 LIV. That the compensation provided for in the contract for boring hole No. 23 was as follows: $15.00 a foot for the first 225 feet; $20.00 a foot from 226-325 feet; $30.00 a foot from 326-425 feet; $35.00 a foot from 426-525 feet; $40.00 a foot from 526-625 feet; $45.00 a foot from 626-725 feet; $50.00 a foot from 726-1,000 feet.

Except.

LV. That the average price per foot for the entire 1,000 feet was $32.10 a foot.

Except.

LVI. That the plaintiff had received for drilling 552 feet $11,820.00, or an average of $21.22 a foot.

Except.

LVII. That at various other borings on the same line with boring No. 23, rock had been struck at various distances.

Except.

LVIII. That at a boring started after the happening of the collision and known as boring No. 24, situated but 80 feet east of boring No. 23, rock was struck at a depth of 693 feet.

Except.

LIX. That it was reasonably certain that the rock under boring No. 23 was situated 700 feet beneath the surface of the water.

Except.

223 LX. That to have completed the boring it would have required 148 feet of additional casing or pipe work, and 300 feet of drilling in rock.

Except.

LXI. That the reasonable cost of drilling in rock was $6.00 a foot.

Except.

LXII. That it would have cost the plaintiff allowing for discontinuing work in the autumn of 1908, and reconnecting the apparatus in the spring of 1909 the sum of $9,520.00 to have completed the boring.

Except.

LXIII. That if the boring had been completed by the plaintiff it would have been entitled to receive under the terms of the contract in addition to what it had already been paid, the sum of $20,305.

Except.

LXIV. That if the plaintiff had completed boring No. 23 it would have received as profits over and above the cost of completing the boring the sum of $10,785.

Except.

LXV. That during the trial of this action the plaintiff's working on boring No. 24 described in Finding LVIII had attained the depth of 708 feet, and the last 15 feet of work had been through rock.

Except.

224 LXVI. That the plaintiff has been paid by the Board of Water Supply of the City of New York for each foot of work it has done on boring No. 24.

Except.

LXVII. That neither plaintiff nor any of its servants or employees did or performed any negligent act that contributed to the collision.

Except.

LXIX. That the contract for boring No. 24 was awarded to the plaintiff by the Board of Water Supply of the City of New York after the collision aforesaid and after it was apparent that work on boring No. 23 could not be resumed. That boring No. 24 was for the purpose of obtaining the same information that the Board of Water Supply expected to obtain from boring No. 23. That the depth to which it was to be sunk was 1,000 feet and the compensation to be paid to the plaintiff was the same as specified in the contract for boring No. 23 and which is set forth in finding LIV and said contract was extended by the Board of Water Supply as a substitute for the contract for boring No. 23 and would not have been awarded to the plaintiff if the boring at No. 23 had been sunk to the depth of 1,000 feet.

That at the time of the trial said boring No. 24 had been sunk to the depth of 708 feet and the plaintiff's chances of completing the contract and earning the compensation agreed to be paid for the work below 700 feet was the same as it was on the contract for boring No. 23 just prior to the collision.

225 *Conclusions of Law.*

The result of the collision was not then a loss of profits to the plaintiff.

Except.

I. That the agents, servants and employees of the defendant were guilty of such negligence as entitles the plaintiff to recover damages it sustained thereby.

Except.

II. That the plaintiff is entitled to recover the actual damages sustained by it from the collision including the pipe lost, anchors and lines, and the other items mentioned in the Findings No. XLVI and XLVII amounting in all to the sum of $4,000.82.

Except.

I accordingly direct judgment for plaintiff against defendant for the sum of $4,000.82, with costs to be taxed.

CHARLES F. BROWN, *Referee.*

Dated, August 15, 1910.

226 *Requests to Find.*

New York Supreme Court.

Action No. 2.

PHOENIX CONSTRUCTION COMPANY, Plaintiff,
vs.
THE CORNELL STEAMBOAT COMPANY, Defendant.

This action having been tried before a Referee without a jury, the defendant above named requests the Referee to find as follows:

The Requests to Find as set forth in the Requests submitted in Action No. 1 herein, and numbered respectively as follows:

As Matters of Fact.

I make the same findings as in Action No. 1. C. F. B.

I, II, IV, V, VI, VIII, IX, X, XXIV, XXVI, XXVII, and in addition thereto:

Found. C. F. B.

III. On the 28th day of October, 1908, the plaintiff had anchored in the navigable waters of the Hudson River at and opposite Storm King Mountain, at the lower end of Newburgh Bay, certain boring plants for the purpose of testing the bottom of the Hudson River at that point.

I find it did not show that it had the permits of the Secretary of War. C. F. B.

227 VII. The plaintiff has failed to show any lawful authority to anchor and maintain its drilling plants and barges in the navigable waters of the Hudson River, at the place where plant No. 23 was injured.

Found. C. F. B.

XI. The evidence does not show that the Board of Water Supply of the City of New York had obtained from the Secretary of War of the United States, a lawful permit to make borings and anchor vessels in the Hudson River at and opposite Storm King Mountain on said 28th day of October, 1908.

Refused except as found in decision. C. F. B.

XII. On October 28th, 1908, in the evening at about nine o'clock, there were three plants located in the navigable waters of the Hudson River and opposite Storm King Mountain. The most westerly plant was known as No. 21, which was located about 750 feet from the water-line of the west shore of the river; easterly of plant 21 and at a

distance of about 575 feet was plant 23, and easterly of plant 23 and at a distance of about 250 feet was plant 20.

Found. C. F. B.

XIII. Plant No. 23 consisted of a boring platform and scow attached thereto, 40x100 feet, with cables extending on either side by which the scow was anchored.

Refused. C. F. B.

228 XX. The plaintiff did not show by competent evidence any lack of skill or diligence on the part of the master of the tug "Osceola."

Refused. C. F. B.

XXI. Plaintiff's evidence cannot be construed to show more than an error of judgment on the part of the captain navigating the tug and tow.

Refused. C. F. B.

XXII. The evidence introduced by the plaintiff does not show negligence on the part of the defendant.

Refused. C. F. B.

XIII. It was not negligence on the part of the captain in charge of the tug "Osceola" to change or modify his course in approaching these drills, if, in his opinion, and good judgment, a change was proper when it for the first time appeared that there was any danger.

Refused. C. F. B.

As Matters of Law.

I. The plaintiff in this action cannot recover upon any other charge of negligence than that set forth in the complaint.

Found. C. F. B.

II. The happening of a collision between this tow and the derrick was not, under the circumstances, prima facie evidence of negligence.

Refused. C. F. B.

229 III. Every presumption to be drawn from the evidence in this case is in favor of an absence of fault on the part of those navigating the tug.

Refused. C. F. B.

IV. The evidence of the navigators and those in command of the tug, as to proper navigation, is entitled to more weight than the evidence of those on the drills.

Refused. C. F. B.

V. A mere error of judgment on the part of the captain of the "Osceola," the navigator of this fleet, did not constitute negligence.

Found. C. F. B.

VI. Without any evidence of a competent witness showing that under like circumstances a navigator using ordinary skill and care would have done differenty, there was a failure of proof to show negligence on the part of the captain of the "Osceola."

Refused. C. F. B.

VII. Plaintiff's complaint should be dismissed with costs.

Refused. C. F. B.

AMOS VAN ETTEN,
Attorney for Defendant.

230 *Exception to Findings and Refusals to Find.*

Supreme Court, New York County.

Action No. 2.

PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
vs.
CORNELL STEAMBOAT COMPANY, Defendant.

The defendant, the Cornell Steamboat Company, excepts to the Findings of Fact determined by the Referee as follows:

I. Exception is taken to the third Finding of Fact that prior to and at the time of the collision, the subject of this action, the Board of Water Supply of the State of New York under authority of a statute of the State of New York was engaged in making test borings in the bed of the Hudson River near Storm King.

II. Exception is taken to so much of the fourth Finding of Fact as finds, "That the making of such test borings was part of a great public improvement."

III. Exception is taken to so much of the fifth Finding of Fact as finds that the contracts therein referred to were duly made and duly assigned, and to such part as finds, "such assignment re-
231 ceiving the consent of the Board of Water Supply of the City of New York."

IV. Exception is taken to the seventh Finding of Fact, "That thereafter and prior to the happening of this collision, the Board of Water Supply of the City of New York made a further modification of this contract by agreement with the plaintiff."

V. Exception is taken to the eighth Finding of Fact, "That prior to the making of the test borings the Board of Water Supply of the City of New York made an application to the Chief of Engineers of the United States Army to drive pipes and anchor vessels near New Hamburg and that the granting of this application was recommended by the Chief of Engineers of the United States Army, and permission to do this work was granted by Robert S. Oliver, Acting Secretary of War on the 2nd day of February, 1906."

VI. Exception is taken to the ninth Finding of Fact, "That thereafter application was made by the Board of Water Supply of the City of New York to change the location of the borings from New Hamburg to Storm King and on the 22d day of March, 1907, Colonel Lockwood of the Corps of Engineers of the United States Army wrote the Board of Water Supply of the City of New York that by the authority of the Secretary of War the permit of July 2nd, 1906, was modified so as to permit the work to be carried on at Storm King," generally and specifically for the reason that
232 said finding is a finding setting forth certain testimony and not a finding of fact founded upon the testimony.

VII. Exception is taken to the tenth Finding of Fact, "That on the 24th day of February, 1908, Colonel John G. D. Knight of

the Corps of Engineers of the United States Army, signed a letter granting permission to the Board of Water Supply of the City of New York to anchor vessels at the Storm King Line. In the said letter it was provided that there should not be in progress simultaneously on said line, more than four borings, and that there should be left unobstructed during the progress of the boring work two channels, one of at least 25 feet depth at mean low water with a width of at least 400 feet in the clear, and the other of at least 30 feet depth at mean low water and with a width of at least 600 feet in the clear," generally and specifically for the reason that said finding is a finding setting forth certain testimony and not a finding of fact founded upon the testimony.

VIII. Exception is taken to the eleventh Finding of Fact, "That at the time of the happening of this collision there was to the west of boring No. 21, a channel over six hundred feet in width and of a depth of at least thirty feet at mean low water and between borings 21 and 23 there was a channel at least 400 feet in width of water at least 25 feet in depth at mean low water."

IX. Exception is taken to the twelfth Finding of Fact, "That the channels here above described in the XI finding were sufficient for the passage of vessels and tows and that a large number of
233 tows and vessels had safely passed through said channels between the borings during the years 1907 and 1908."

X. Exception is taken to the thirteenth Finding of Fact, "That prior to the collision, the defendant had been notified of the location of each of the vessels of the plaintiff at each of the borings."

XI. Exception is taken to the fourteenth Finding of Fact, "That the defendant was familiar with the position of the vessels of the plaintiff at each one of the borings."

XII. Exception is taken to the fifteenth Finding of Fact, "That officials of the United States Government had prescribed that during the night, white anchor lights should be maintained upon each vessel located at each of the borings."

XIII. Exception is taken to the sixteenth Finding of Fact, "That on the night in question the plaintiff maintained proper and adequate white lights upon each one of its vessels located at each one of the borings."

XIV. Exception is taken to the seventeenth Finding of Fact, "That on the night on which the collision occurred the lights maintained by the plaintiff on each of its vessels located at the respective borings were visible for a distance of several miles and were seen by the captain of the defendant's tug Osceola when said tug was over a mile away from the boring."

234 XV. Exception is taken to the eighteenth Finding of Fact, "That on the night of October 28, 1908, the following borings were in position on the line at Storm King: Boring No. 21 which was 718 feet from the west shore of the Hudson River; boring No. 23 which was 599 feet east of boring No. 21; boring No. 20 which was 242 feet east of boring No. 23 and about 1,260 feet west from the east bank of the Hudson River."

XVI. Exception is taken to the twenty-third Finding of Fact,

"That prior to the collision and during the month of September, 1908, certain correspondence passed between the plaintiff and defendant, that on or about the 8th day of September, 1908, the plaintiff removed boring No. 22 from the river, thus leaving a third channel of water 20 feet deep between 500 and 600 feet in width," generally and specifically for the reason that said finding is a finding setting forth certain testimony and not a finding of fact founded upon the testimony.

XVII. Exception is taken to the twenty-fouth Finding of Fact, "That after the removal of boring No. 22, and before the happening of this collision the defendant informed the plaintiff that it would instruct its captains to use as far as possible the channel to the east of boring No. 20 referred to in Finding No. XXIII," generally and specifically for the reason that said finding is a finding setting forth certain testimony and not a finding of fact founded upon the testimony.

XVIII. Exception is taken to the twenty-fifth Finding of
235 Fact, "That on the night of October 28, 1908, at the time the collision occurred the tide was running strong ebb, there was practically no wind, what wind there was being from the north and northwest. The water was smooth and the night was rainy."

XIX. Exception is taken to the twenty-sixth Finding of Fact, "That at and near boring No. 23, the ebb tide sets towards the east with a tendency to carry vessels and other objects in a southeasterly direction."

XX. Exception is taken to the thirty-first Finding of Fact, "That the average loaded canal boat with its cargo weighed three hundred tons."

XXI. Exception is taken to the thirty-second Finding of Fact, "That the tow was about 90 feet wide and the entire length of the tow including the hawser tug and canal boats was about 1,300 feet."

XXII. Exception is taken to the thirty-third Finding of Fact, "That in changing the course of a loaded tow time must be given to shape the course."

XXIII. Exception is taken to the thirty-fifth Finding of Fact, "That the laying of the course of the Osceola so that she passed so close to boring No. 23, was an act of negligence, which contributed to the happening of the collision."

XXIV. Exception is taken to the thirty-sixth Finding of Fact, "That shortly before the collision the Osceola changed her
236 course to go to the westward and in so doing caused the ebb tide to swing her tow to the eastward."

XV. Exception is taken to the thirty-seventh Finding of Fact, "That in changing the course of the Osceola to the westward and in permitting her tow to swing to the eastward, the captain of the Osceola committed an act of negligence, which contributed to the collision."

XXVI. Exception is taken to the thirty-eighth Finding of Fact, "That the captain of the Osceola did not sufficiently allow for the effect of the ebb tide."

XXVII. Exception is taken to the thirty-ninth Finding of Fact,

"That the captain of the tug Osceola was also negligent in failing to give timely signals to the Primrose, owned by the defendant, and in failing to take measures to push the rear of the tow over towards the west."

XXVIII. Exception is taken to the fortieth Finding of Fact, "That the captain of the tug Primrose was also negligent in failing to give timely signals to the Osceola and in failing to take timely measures to push the tail end of the tow toward the west."

XXIX. Exception is taken to the forty-second Finding of Fact, "That the force of the collision broke a plank on the canal boat O. F. Hawley and drove scow A considerably to the south and east of its former position."

XXX. Exception is taken to the forty-third Finding of
237 Fact, "That the force of the collision entirely carried away the pipe which composed boring No. 23, breaking the same at a point about four feet beneath the top of the bed of the river at about 80 feet below the surface of the water."

XXI. Exception is taken to the forty-fourth Finding of Fact, "That a search made by an expert diver failed to show the presence of the pipe within a radius of a hundred feet from where it formerly had been."

XXXII. Exception is taken to the forty-fifth Finding of Fact, "That where the pipe had been broken as described in Finding No. XLIII the various sizes of pipe were flat and bent over."

XXXIII. Exception is taken to the forty-sixth Finding of Fact, "That as the result of the collision a large amount of drive pipe was lost of the value of $3,040.37."

XXXIV. Exception is taken to the forty-seventh Finding of Fact, "That as a result of the collision, anchors were lost, also anchor lines, diver's expenses and wages were incurred, tugs were hired, a skiff was damaged, telephone calls were required and the use of Scow A and B with their crews were required for five days for cleaning up the wreck."

XXXV. Exception is taken to the forty-eighth Finding of Fact, "That the total damages sustained by the plaintiff from the collision for the items mentioned in the Findings XLVI and XLVII were 4,000.82."

238 XXVI. Exception is taken to the forty-ninth Finding of Fact, "That as a result of the collision it became necessary for the plaintiff to abandon further work under its contract with the Board of Water Supply of the City of New York upon boring No. 23," generally and as not material.

XXXVII. Exception is taken to the fiftieth Finding of Fact, "That under the contract between the plaintiff and the Board of Water Supply of the City of New York, the plaintiff was entitled to proceed with boring No. 23 until the depth of one thousand feet below the surface of the water should have been reached," generally and as not material.

XXXVIII. Exception is taken to the fifty-first Finding of Fact, "That for the 552.2 feet which had been already attained at the time of the collision, the cost to the plaintiff had been $10,800.00,

and the plaintiff has been paid by the Board of Water Supply of the City of New York $11,820.00," generally and as not material.

XXXIX. Exception is taken to the fifty-second Finding of Fact, "That the total contract price for the entire 1,000 feet was $32,105.00," generally and as not material.

XL. Exception is taken to the fifty-third Finding of Fact, "That the compensation of the plaintiff was so arranged at the beginning of the work, that the expenses of performing the work at the beginning were greater than the compensation provided for in the contract for that part of the work," generally and as not material.

239 XLI. Exception is taken to the fifty-fourth Finding of Fact, "That the compensation provided for in the contract for boring hole No. 23 was as follows: $15.00 a foot for the first 225 feet; $20.00 a foot from 226-325 feet; $30.00 a foot from 326-425 feet; $35.00 a foot from 426-525 feet; $40.00 a foot from 526-625 feet; 45.00 a foot from 626-725 feet; $50.00 a foot from 726-1,000 feet;" generally and as not material.

XLII. Exception is taken to the fifty-fifth Finding of Fact, "That the average price per foot for the entire 1,000 feet was $32.10 a foot, generally and as not material.

XLIII. Exception is taken to the fifty-sixth Finding of Fact, "That the plaintiff had received for drilling 552 feet $11,820.00, or an average of $21.22 a foot," generally and as not material.

XLIV. Exception is taken to the fifty-seventh Finding of Fact, "That at various other borings on the same line with boring No. 23, rock had been struck at various distances," generally and as not material.

XLV. Exception is taken to the fifty-eighth Finding of Fact, "That at a boring started after the happening of the collision and known as boring No. 24, situated but 80 feet east of boring No. 23, rock was struck at a depth of 693 feet," generally and as not material.

XLVI. Exception is taken to the fifty-ninth Finding of Fact, "That it was reasonably certain that the rock under boring
240 No. 23 was situated 700 feet beneath the surface of the water," generally and as not material.

XLVII. Exception is taken to the sixtieth Finding of Fact, "That to have completed the boring it would have required 148 feet of additional casing or pipe work, and 300 feet of drilling in rock," generally and as not material.

XLVII. Exception is taken to the sixty-first Finding of Fact, "That the reasonable cost of drilling in rock was $6.00 a foot," generally and as not material.

XLIX. Exception is taken to the sixty-second Finding of Fact, "That it would have cost the plaintiff allowing for discontinuing work in the autumn of 1908, and reconnecting the apparatus in the spring of 1909 the sum of $9,520.00 to have completed the boring," generally and as not material.

L. Exception is taken to the sixty-third Finding of Fact, "That if the boring had been completed by the plaintiff it would have been

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entitled to receive under the terms of the contract in addition to what it had already been paid, the sum of $20,305," generally and as not material.

LI. Exception is taken to the sixty-fourth Finding of Fact, "That if the plaintiff had completed boring No. 23 it would have received as profits over and above the cost of completing the boring the sum of $10,785," generally and as not material.

241 LII. Exception is taken to the sixty-fifth Finding of Fact, "That during the trial of this action the plaintiff's working on boring No. 24 described in Finding LVIII had attained the depth of 708 feet, and the last 15 feet of work had been through rock," generally and as not material.

LIII. Exception is taken to the sixty-sixth Finding of Fact, "That the plaintiff has been paid by the Board of Water Supply of the City of New York for each foot of work it has done on boring No. 24," generally and as not material.

LIV. Exception is taken to the sixty-seventh Finding of Fact, "That neither plaintiff nor any of its servants or employees did or perform any negligent act that contributed to the collision."

LV. The defendant excepts generally to each and all of the Findings of Fact except the sixty-ninth upon the ground that they set forth certain testimony given on the trial and are not findings of fact based upon the testimony.

This defendant excepts to the Conclusions of Law as found by the Referee, as follows:

1. To the first Conclusion of Law, that the agents, servants and employees of the defendant were guilty of such negligence as entitles the plaintiff to recover damages it sustained thereby.

2. To the second Conclusion of Law, that the plaintiff is entitled to recover the actual damages sustained by it from the collision including the pipe lost, anchors and lines, and the other items mentioned in the Findings No-. XLVI and XLVII amounting in all to the sum of $4,000.82.

242 This defendant further excepts to the refusal of the Referee to find as matters of fact the following Requests made by the defendant:

I. Exception is taken to the refusal of the Referee to find the ninth Request to Find that plaintiff has failed to show that it had authority from the legislature of the State of New York to anchor and maintain its drilling plants and barges at the place or places where they were injured.

II. Exception is taken to the refusal of the Referee to find the tenth Request to Find that the evidence fails to show that the plaintiff was lawfully engaged in the performance of work upon the waters of the Hudson River opposite Storm King.

III. Exception is taken to the refusal of the Referee to find the twenty-fourth Request to Find that it was negligence on the part of the plaintiff to anchor these drills without some inquiry from navigators, or men familiar with navigation, as to their proper location so as not to impede navigation unnecessarily.

IV. Exception is taken to the modification of the twenty-sixth

Request to Find that the narrow passage at the lower end of Newburgh Bay between Storm King and Breakneck Mountains, where these drills were placed, is considered by navigators the most dangerous point in the Hudson River to navigate.

V. Exception is taken to the modification of the seventh
243 Request to Find that the plaintiff has failed to show any lawful authority to anchor and maintain its drilling plants and barges in the navigable waters of the Hudson River, at the place where plant No. 23 was injured.

VI. Exception is taken to the modification of the twelfth Request to Find that on October 28th, 1908, in the evening at about nine o'clock, there were three plants located in the navigable waters of the Hudson River and opposite Storm King Mountain. The most westerly plant was known as No. 21, which was located about 750 feet from the water-line of the west shore of the river; easterly of plant 21 and at a distance of about 575 feet was plant 23, and easterly of plant 23 and at a distance of about 250 feet was plant 20.

VII. Exception is taken to the refusal of the Referee to find the twentieth Request to Find that the plaintiff did not show by competent evidence any lack of skill or diligence on the part of the master of the tug "Osceola."

VIII. Exception is taken to the refusal of the Referee to find the twenty-first Request to Find that plaintiff's evidence cannot be construed to show more than an error of judgment on the part of the captain navigating the tug and tow.

IX. Exception is taken to the refusal of the Referee to find the twenty-second Request to Find that the evidence introduced by the plaintiff does not show negligence on the part of the defendant.

X. Exception is taken to the refusal of the Referee to
244 find the twenty-third Request to Find that it was not negligence on the part of the captain in charge of the tug "Osceola" to change or modify his course in approaching these drills, if, in his opinion and good judgment, a change was proper when it for the first time appeared that there was any danger.

XI. Exception is also taken to the refusal of the Referee to find as Matters of Law the requests to decide as follows:

1. Exception is taken to the refusal of the Referee to find the second Request to Find that the happening of a collision between this tow and the derrick was not, under the circumstances, prima facie evidence of negligence.

2. Exception is taken to the refusal of the Referee to find the third Request to Find that every presumption to be drawn from the evidence in this case is in favor of an absence of fault on the part of those navigating the tug.

3. Exception is taken to the refusal of the Referee to find the fourth Request to Find that the evidence of the navigators and those in command of the tug, as to proper navigation, is entitled to more weight than the evidence of those on the drills.

4. Exception is taken to the refusal of the Referee to find the sixth Request to Find that without any evidence of a competent witness showing that under like circumstances a navigator using

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ordinary skill and care would have done differently, there was
245 a failure of proof to show negligence on the part of the captain of the "Osceola."

5. Exception is taken to the refusal of the Referee to find the seventh Request to Find that plaintiff's complaint should be dismissed, with costs.

AMOS VAN ETTEN,
Attorney for Defendant.

Rondout, Kingston, N. Y.

Proposed Finding of Facts and Conclusions of Law.

Supreme Court, New York County.

Action No. II.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
vs.
CORNELL STEAMBOAT COMPANY, Defendant.

SIRS: Please take notice that the plaintiff herein excepts to the refusal of the Referee herein, to find as requested in the annexed Proposed Findings of Fact and Conclusions of Law.

Dated, New York, August 18, 1910.

E. CROSBY KINDLEBERGER,
Attorney for Plaintiff.

Office and Post Office Address, No. 2 Rector Street, Borough of Manhattan, City of New York.

245a To William J. Schneider, Esq., Clerk of the County of New York.

To Amos Van Etten, Esq., Attorney for Defendant, Rondout, N. Y.

Supreme Court, New York County.

Action No. II.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
vs.
CORNELL STEAMBOAT COMPANY, Defendant.

Finding of Fact.

I. That the Board of Water Supply of the City of New York had secured a proper permit from the proper authorities of the United States Government, authorizing it to carry on the work of making the borings at Storm King.

Refused. C. F. B.

Conclusions of Law.

I. That the plaintiff was rightfully occupying the river and was acting under a valid and proper permit issued by the proper United States officials.

Refused. C. F. B.

II. That the plaintiff is entitled to recover as damages from the collision the reasonable profits which it would have been entitled to receive under the contract to complete boring No. 23 and
245*b* should recover the sum of $10,785.00 on account of said profits.

Refused. C. F. B.

Dated, August 15, 1910.

E. CROSBY KINDLEBERGER,
Attorney for Plaintiff.

Office and Post Office Address, No. 2 Rector Street, Borough of Manhattan, City of New York.

Judgment.

Supreme Court, New York County.

Action No. II.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
vs.
CORNELL STEAMBOAT COMPANY, Defendant.

This action having been referred by an order duly made and entered herein on the 17th day of December, 1909, upon the written consent of the parties hereto duly filed, to the Hon. Charles F. Brown to hear and determine the whole issues and after trial had on due notice to all the parties, said Referee having on the 15th day of August, 1910, duly made his report herein which was filed on August 19, 1910, in the office of the Clerk of the County of New York, stating the findings of fact herein and conclusions of law thereon and directing judgment as hereinafter stated and the plaintiff's costs having been duly adjusted at four hundred seventeen and 02/100 dollars,

246 Now on motion of E. Crosby Kindleberger, attorney for the plaintiff, it is

Adjudged, that the said plaintiff recover of the said defendant the sum of four thousand and 82/100 ($4,000.82) dollars, awarded by the decision of the referee herein with interest thereon from August 15, 1910, to September 6, 1910, amount- to fourteen and 68/100 ($14.68) dollars, and four hundred seventeen and 02/100 ($417.02) dollars costs, making together four thousand four hundred thirty-two and 52/100 ($4,432.52) dollars.

Dated, New York, September 6, 1910.

WILLIAM F. SCHNEIDER, *Clerk.*

247 *Testimony.*

Supreme Court, New York County.

Action No. 2.

PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
vs.
THE CORNELL STEAMBOAT COMPANY, Defendant.

Before Hon. Charles F. Brown, Referee.

NEW YORK, *March* 31, 1910—at 2 p. m.

Met before the Referee pursuant to notice.

Appearances:

E. Crosby Kindleberger, Esq., Attorney for Plaintiff.
Amos Van Etten, Esq., and H. H. Flemming, Esq., Attorneys for Defendant.

It is stipulated that the oath of the Referee herein be and the same hereby is waived.

It is stipulated that the Referee be not limited in his charges herein to the statutory fees.

It is stipulated that the services of a stenographer are necessary; that Bryan W. Tichenor be and he hereby is employed as such stenographer; that he shall furnish three copies of his minutes, one for the Referee and one for each side, at the usual and customary rate in such cases, and that the amount paid him therefor shall be taxed against the losing party as a necessary cost of this reference.

248 It is stipulated that the testimony taken herein not relating to the facts of any particular accident may be deemed to apply to all three actions, so far as the same is relevant.

It is stipulated that Exhibits Nos. 1, 2 and 3, Action No. 1, being three letters from the War Department, shall be deemed exhibits in this action.

That Exhibits Nos. 4, 5, 9, 10, 11 and 12, being the contracts, amendments, modifications and assignments, be deemed exhibits in this case.

That Exhibits Nos. 13, 14, 19, 20 and 21, being letters of notification concerning the obstructions, be deemed exhibits in this case.

That Exhibit 7, the chart of the Hudson River, shall be deemed an exhibit in this case.

FRANCIS W. BELKNAP, sworn for Plaintiff, testified:

Direct examination.

By Mr. KINDLEBERGER:

I am a contracting engineer. I graduated in 1895 from the Massachusetts Institute of Technology, with a degree of Bachelor of Science in the Department of Civil Engineering. Since that time I have been in charge of constructing highways for the State of Massachusetts until the Fall of 1897, as resident engineer, in Hadley, Lexington, Athol and various other towns. In the Spring of 1898 I began engineering work in the City of New York. I was assistant engineer for the Department of Docks and Ferries until November, 1903 or 1904, I am not sure which. I left the city's employ to
249 go with the Phœnix Construction Company as the engineer of the company, and in the Spring of 1905 I became a stockholder of the company and was elected secretary as well as engineer.

Q. What has been the work of the Phœnix Construction Company, speaking generally, outside of these borings?

A. Well, we were contractors for the experimental tunnel for the Pennsylvania Railroad at the foot of 35th Street. We built granite sea walls for the Edison Company at 39th Street, and also in the Harlem River. We built the Stapleton Ferry Terminal for the City of New York and the 8th Ward market foundations for the Borough of Brooklyn. In fact we have done about $700,000 worth of work a year of general water front improvement and foundation work, mass concrete and reinforced concrete.

It is stipulated that all the general testimony given by Mr. Belknap concerning the work at Storm King and Breakneck up to the time of the happening of the accident which is the subject of Action No. 1, and excluding the details of that action, shall be deemed testimony in this action.

(Witness shown letter.) I received this letter.

Mr. KINDLEBERGER: I offer in evidence letter from the Cornell Steamboat Company to the Phœnix Construction Company, dated September 8th, 1908.

Same admitted, marked Plaintiff's Exhibit No. 22.

This letter you show me is a copy of a letter our corporation sent to Cornell Steamboat Co.

250 Mr. KINDLEBERGER: I offer the copy in evidence.

Same admitted, marked Plaintiff's Exhibit No. 23.

This letter, dated September 11th, we subsequently received from the Cornell Company.

Mr. KINDLEBERGER: I offer it in evidence.

Same admitted, marked Plaintiff's Exhibit No. 24.

This is a copy of a letter we sent to the Cornell Company.

Mr. KINDLEBERGER: I offer the letter in evidence.

Same admitted, marked Plaintiff's Exhibit No. 25.

(Two letters shown.) These two letters, both dated September 14th, one addressed to the company and one to me as secretary, were received.

Mr. KINDLEBERGER: I offer them in evidence.
Same admitted, and marked, letter to Company, No. 26, and letter to Mr. Belknap, No. 27.

I wrote this letter of September 19th you show me, and sent it to the Cornell Company.

Mr. KINDLEBERGER: I offer it in evidence.
Same admitted, marked Plaintiff's Exhibit No. 28.

This letter you show me I received from the Cornell Company.

Mr. KINDLEBERGER: I offer it in evidence.
251 Same admitted, marked Plaintiff's Exhibit No. 29.

I sent this letter you show me, dated September 24th, 1908.

Mr. KINDLEBERGER: I offer it in evidence.
Same admitted, marked Plaintiff's Exhibit No. 30.

I was not present when this accident happened on the 28th of October. I don't remember exactly when I first saw the conditions up there; probably the next day. I don't think I went on the scow after this accident.

Cross-examination.

By Mr. VAN ETTEN:

Q. Do you mean to say, Mr. Belknap, that Mr. Coykendall agreed to put a light there?
A. So I understood, sir.
Q. Wasn't the talk between you and him that he would find out what was necessary in order to put a light there?
A. I understood he was going to put the light there, as I stated in the letter.

By the REFEREE:

Q. Where was he going to put it? Where was it to be located?
A. He spoke at that time of the shoals off Polopel. Off the east bank and just below Polopel. He said that a straight line from Polopel through that east channel would very likely put him aground, and for that reason the edge of the shoal should be noted with a light.

252 By Mr. VAN ETTEN:

Q. Well, isn't it your recollection that he told you that he would find out what was necessary to do or to whom application should be made to have the light placed there?
A. No; I understood he was going to put the light there.
Q. (Presenting letter.) Do you remember getting a letter like that?

A. Yes, sir; we got that letter, but that was my first intimation from Mr. Coykendall that he wasn't going to put the light himself, and that caused the whole correspondence.

Q. When was the conversation that you had with Mr. Coykendall?

A. I don't remember that. I suppose it must have been about three or four days or a week prior to September 8th.

Mr. VAN ETTEN: I offer the letter referred to in evidence as part of his cross-examination.

Same admitted, marked Defendant's Exhibit D-1, and reads as follows:

"NEW YORK, *Sept.* 8, 1908.

Phœnix Construction Co., No. 41 Park Row, New York.

GENTLEMEN: Referring to our conversation with your Mr. Belknap, we find that application to place a light on the channel bank opposite Polopel Island should be made to the Inspector, Third Lighthouse District, Tompkinsville, N. Y.

Yours truly,

CORNELL STEAMBOAT COMPANY
FR. COYKENDALL,
General Manager."

253 Q. Now, that was immediately after your conversation with Mr. Coykendall, or within a few days after, wasn't it?

A. I don't remember about that.

Q. Well, you said the conversation was two or three or four days——

A. I said I supposed it must have been. I could fix that conversation by finding out the date on which we moved the scow.

(It is stated that the scow referred to was moved September 9th).

The WITNESS: Then the 4th of September would be about right.

GEORGE A. HAMMOND, sworn for Plaintiff, testified:

Direct examination.

By Mr. KINDLEBERGER:

On the morning of October 29, 1908, I visited these borings. The train arrived there about 8 o'clock.

Q. What did you find as to the conditions?

A. I found scow A that was lying at hole 23, her anchor lines were gone and the watchman had her tied down to scow B, which lay a little to the west of A. She had one anchor, I think, holding her up, and she lay probably fifty feet west of B. There wasn't any pipe or anything in sight. Scow B was on hole 20, but some of her lines were gone. (Referring to diagram.) This is the scow that was hit. The engineers located this boat, and there is where she laid when I got there. I am referring now to the dotted line. These anchor lines

were all gone off here, and she had one line running from
254 here over. The paper I am now referring to is marked Exhibit 31 for Identification. I think there was one anchor line still on there, the northeast anchor line, but the anchor had drug away. I took a drag line and two skiffs and we drug the bottom to locate the pipe, and we couldn't hook to anything. We went by ranges and took a small scow out and anchored her at the point where the hole was supposed to be, and I think it was the second or 3rd of November we sent down a diver—we sent to New York for an outfit—and he reported the only thing he could find was a hole in the mud where the pipe had been pulled over and gone. We supposed the boat hooked onto the pipe and pulled it away. Never found anything. The diver reported the pipe was all gone. I have a memorandum here, telling just what pipe there was in that hole at the time of the accident. (Referring.) 17 in. pipe 236 feet; 14 inch pipe 443 ft.; 10 in. pipe 533 ft.; 8 in. pipe 518 ft.; 4 in. pipe 478 ft. I would say that we had been down to 552 feet in that hole with 4 inch pipe and we took that out and put in an 8 in. pipe and then we were lowering back the 4 in. pipe for a wash-pipe and we hadn't it all in yet that night when we quit work. We lost three 600-pound mushroom anchors; three 1000-pound mushrooms, two big stone anchors, and eight anchor lines, wire cable, about 500 feet each. Scows A and B were something like six or seven days at work cleaning up after this accident.

Cross-examination.

By Mr. Van Etten:

The pipe I have mentioned was regular drive pipe, ⅜ I
255 think, the walls of the large pipe. The 17 inch was steel pipe. It had extra long strong couplings. The office has a record of the cost of the pipe. I didn't buy the pipe; it was bought by the New York office and shipped to me at Cornwall. This pipe was protected with anchors, both on the scow and on the pipe. Those anchors the day before the accident were all right. When we pulled away from the pipe at night we always tightened our anchors on the pipe. We were working there at this time. I left the plant in the evening about half past five; all work ceased there at that time. Everybody had left except James Robinson, a watchman. Lights were always placed at sundown before the day gang left. The night before every boat had a light on her. I saw them from the shore before I left. Leaving there, I went from the scow by boat and took the New York Central train down from Storm King station. When we pulled up our pipe in the day-time we slacked off the anchor lines, when driving pipe, and pull back about five or six feet every night, so in case of a south wind it won't nudge the boat over the pipe. We took block and falls and tightened up the anchor lines so the tide doesn't sway the pipe.

Q. Without interfering with the borings, couldn't your boring plant and scows be removed from the channel when you were not working, at night?

A. Why, you could take the boat out, but you couldn't take the pipe out. It would take quite a while to take the boat out. You couldn't do it. It would take all day to get your anchor lines in shape to lower them on the bottom, and then it would take as long to get them in the morning again. We wouldn't have time
256 to do it. We never do it; the only time I ever knew any of the boats being removed was when the Cornell people did it.

Q. Do you mean to say you could not buoy your anchors and take your plant away at night and bring it back in the morning and attach it again?

A. It would take quite a while to do it.

Q. That is the only objection, isn't it?

A. I don't think it is practicable; no, sir.

Q. In dredging and drilling where they are making channels or working in channels, they do it, don't they?

A. They could remove a dredge, but what benefit would it be to take the boat out and leave the pipe there? It ain't practicable to take the boat in nights and bring it out in the morning.

Q. It could be done, the only question is the matter of time, that is what you mean isn't it?

A. I don't know whether it could be done or not. You couldn't do any work. It would take all your time to move the boat and you wouldn't have any time left to work. It took one day to shift one of these drills.

By the REFEREE:

It would take so much time to replace the boat that we wouldn't have any time to work. And if you took up all the anchor lines it would be dangerous to the pipe.

By Mr. VAN ETTEN:

As to buoying our anchors at night and go back in the morning and attach our plant, by the time we got our boat located it would be time to buoy our anchors again and go ashore. I don't think we would have time to do it. I am not very much familiar with navigation. I have done this kind of
257 work on a good many rivers, but never navigated a boat—any more than a row-boat.

Redirect examination.

By Mr. KINDLEBERGER:

I have done similar work on other rivers where we had boats out in the middle of the stream. I have done work on the Harlem River up here, and on the Shoshone River in Wyoming; on the Colorado River we had boats too. We never moved those boats at night time; always kept them in the middle of the stream, and as far as I know, that is always the way that work has been done. The Colorado River is navigable for 150 miles above Yuma, and from the Needles; but they never take the same channel there—the channel changes all the time.

Recross-examination.

By Mr. VAN ETTEN:

In locating these borings the city engineers selected the point. They would set two flags ashore, two range flags here; (ind.) and we would go out and locate the boring. I have heard this correspondence between Mr. Belknap and Mr. Coykendall read here.

Q. Haven't you heard them talking about taking the east drill out?

A. That was another one, that was not putting one in.

Q. I mean in taking them out or putting them in, you did that as you saw fit?

A. No, never put in one unless with orders from headquarters to put one in, and never took one out unless with orders.

258 Q. Who did you get orders from to take this out, on the east side?

A. It was done through my company—Mr. Belknap, and the order to put one in came through him to me.

JAMES H. ROBINSON, sworn for plaintiff, testified:

Direct examination.

By Mr. KINDLEBERGER:

I have been around rivers about twenty years, off and on. I worked on the steamboat Poughkeepsie, and decked on the old Miller for a season, and I worked on the sloop Annie M. Tower. I don't think I worked on steamboats over 3 or 4 years altogether. On the night of October 28th I was night watchman on Scow A. (Referring to map.) That is boring No. 23, the middle one. Scow A was one of those car-floats, I suppose, cut in two, as far as I could get at it. I never measured her to tell exactly what width she was, but she was a good long boat.

(It is conceded that the size of the boat referred to was 40x100 feet.)

I went aboard about 6 o'clock that night. The lights were hung up when I got there, one forward and one aft; regular white anchor lights that they carry on sloops and schooners. I never measured how high the light was, but I judge about twenty feet. It was forward on the boat. Here is your pile-way (ind.) and here is the light hung right alongside of it. On the night in question, about nine o'clock, I noticed the weather. It was dark, rained a

259 little, and very little wind. I could see the lights of both shores and I could see down as far as West Point; that is about three miles, and I could see the lights away off towards Newburgh or New Windsor, which is somewheres around four miles away. I could see the lights on the other borings; they were burning all right.

Q. Now, what first called you- attention to the tug of the Cornell Steamboat Company about 9 o'clock?

A. Well, I used always to set by the west window in the cabin—a sliding window, opening this way (ind). I am a fisherman and I set there knitting nets, and every once in a while I would open the window and look out up and down the river and see if there was anything coming. The first I spied her she was coming off Plumb Point, on the west side of the river, coming down. I saw all her lights, green starboard, red port and three staff lights. I couldn't swear to her bow light. When I first saw the tug she was coming down and she had a list a little to the eastward. I thought she was going to take the east channel, east of Scow B, boring No. 20. I closed up my window again and went over and got my coat and my pipe, filled it and took a smoke. The next time I opened the window she was right opposite Cornwall, I should judge, and the helper Primrose was on the west side of her, and the helper let go the west side and went around the tail end of the tow and come in on the east side. As I said before, I saw it was going to take the east channel, and when I looked again she was about opposite Cornwall, and then she was right direct head on.

Q. Describe from then on just what happened? Describe it in your own way—just what you saw?

A. I didn't pay any more attention for a few minutes—I
260 was knitting there—and I went around and shoved the window open again, probably in five minutes or maybe a little sooner, and I looked at her and then I saw she was going to the westward. I jumps up then and gets my oil-skin coat and lantern and by that time the Osceola, the leading tug, was passing the scow to the west of me. I got on deck and I said, "What do you want to do—rub me again? Why don't you go to the westward?" I hollered that to the pilot on the tug. He was very close, I could hear him talk. Then I walked forward and hollered to the tug Primrose, "You want to get after them." He said, "You want to look out for yourself," and he blow'd and backed off, and then I walked across the boat and stood at the northeast corner and she was coming into me.

Q. Now, when you state that she blew, how many whistles did she blow?

A. She blow'd one whistle and let his line go, and then blow'd four short whistles, and the big tug Osceola answered but I didn't count the whistles.

Q. How did the tow hit you, which part of the tow?

A. I was laying here (ind.) and she was coming across that way in sideways and the tail end wrapped right around me, as near as I could tell. It was night time and dark. The east side of the tow hit me, the port side coming down. After the tow hit me the Primrose come in between me and scow B. I said, "What are you going to do—let me drift around the river?" He said, "Are you all loose?" I said, "I guess I am—what tug is towing?" He said, "The Osce-
ola." I said, "What is the name of that boat (helper)?" and
261 he says, "The Primrose." I said, "That's all I want to know." I don't know who it was that hollered. The Primrose went by right close between scows A and B. I don't suppose they was over 100 feet apart—they were there close together, and the

tug clipped the stern anchor on scow B, boring No. 20. There wasn't any fog that night.

By the REFEREE:

Q. What happened to you after she hit you? Did you drift down?
A. No, just sagged a little.
Q. You didn't break away from the anchors?
A. Fetched up on the stern anchors. I think I was all gone forward.
Q. But the stern anchors held?
A. Well, it was ebb tide, you know, and naturally she sagged down, and Mr. Griffin come off on a small boat and asked if the pipe was all gone——

By Mr. KINDLEBERGER:

Q. What happened to the pipe?
A. Well, I searched around there looking for the pipe and it was all gone, we couldn't locate no pipe.
Q. Did you hear any noise?
A. Well, I guess so. You would think so if you had been there—crash with iron around there.

Cross-examination.

By Mr. VAN ETTEN:

There were three watchmen there that night, one on each scow. Jack Henderson was on scow B and I was on scow A.

Q. You remarked a moment ago that you called out to
262 the Captain, "You want to hit me again?"

A. I asked him was he going to rap me again, because he had rapped against me twice before that—the boats had rubbed up against me and never done no damage—yes, I think they took the northwest anchor line one night.

Q. So it was a common thing with tows—they came very close there and rubbed against you frequently?
A. That was the third time of that boat.
Q. As a matter of fact they always went pretty close didn't they?
A. Yes, sir.
Q. And from your observation would you say they had difficulty in getting through there?
A. Yes, sir. He didn't go to the westward quick enough, because the tide sets off east. It sets us off there from Cornwall to the eastward on ebb tide, and that would be towards the scow that was struck. The Primrose was on the east side of the tow. I don't think she was doing anything, I didn't hear no exhaust out of her. I didn't take no particular notice how near the tail of the tow she was, but she was over at the back end or middle of the tow.
Q. How far do you think the main—large tug, that had the fleet in tow, how far do you say it went from the boat which you were on?
A. Well, that I couldn't exactly tell you. She was so close I could talk to them, and the first tier of boats or scows come by me I could

throw anything on to them, there was just merely room to row between the first tier and my scow. I had seen that often before, but not quite as close as that. We had two lights on our boat or scow, and there was a cabin on it, all of six or seven feet high. It
263 was a rainy night, and I was sitting inside knitting a net. It didn't rain hard then.

Q. And don't you know there was quite a wind through there?

A. Not then, no, sir. Not five minutes to nine because I rowed ashore right after she plugged me.

Q. Do you know whether there was any mist at all?

A. What do you mean "mist?" It was a fine rain—what you might call kind of mist like.

Q. You were knitting there and were paying no particular attention to the position of this tow?

A. I was watching the tow from the first time I spied her. I know'd she hadn't went down. I seen her before at Newburgh when I went down on the 5 o'clock train. I live at New Hamburg; I knew the tow was coming, I passed her. I am a fisherman.

Q. Now when you first saw her just tell us what light you saw on the tug to indicate a tow?

A. I think two staff lights on the stern, two white lights, one over the top of the other; that indicates a tug boat with a tow.

Q. You are sure there weren't three?

A. They are supposed to carry three, and a helper two. Then I seen another bunch of lights behind it, and then of course I knew it was a tow. I also saw the starboard and port lights on the tug. I didn't pay attention to the bow light; it must have been there, but I didn't take no notice.

Q. Looking at the lights at that time, when you see a red and a green light that indicates that the tow is headed towards you?

A. Yes, sir.

Q. You would see those lights even though her course was
264 not directly towards you, wouldn't you?

A. You would naturally see them a distance away and you would swear she was coming for you, at that distance.

Q. Now did you see the same lights when you looked the second time?

A. She was covering the green on me at that time when opposite Cornwall, going to the eastward, the green was getting covered on me. She was just closing it in. I could see a little of it. What I mean is, you could see the red very clearly but you could but indistinctly see the green. She was going to the eastward then.

Q. Then what was the next thing you saw?

A. I seen all the lights the next time, the red and green and white. I was on the west side of the cabin, which was pretty straight up and down the river. I just looked out like that (illustrating) up and down. I had to poke my head outside of the window. I made three observations on the lights, and I have told you correctly what I saw. Each time I looked out I saw the red and green lights and the white lights on the tow, only the second time I did not see the green light very distinctly.

Redirect examination.

By Mr. KINDLEBERGER:

Q. You said you noticed the green light half obscured, that is, it wasn't quite so distinct, didn't you?

A. Yes, sir.

Q. And you said right after that that meant the boat was going to the eastward. You mean going to the westward, didn't you?

265 A. I made a mistake there. Anyone is liable to make a mistake.

Q. Then your answer is what? What did you mean, that the boat was going which way when she was covering the green?

A. She was going to the westward. She must have been covering the red instead of the green; I misspoke the lights, that's all.

JOHN H. GRIFFITH, sworn for plaintiff, testified:

Direct examination.

By Mr. KINDLEBERGER:

The boat I was on that night was No. 1, at boring 21, the westerly boring, on Storm King side. It was a dark evening—hazy—little rainy like. With reference to lights they all *shown* pretty bright. I could see the lights of Newburgh and vicinity—all around, as you can on clear nights. Newburgh is about five or six miles away. The lights on our boat were burning bright the same as every night; had a regular anchor light, eighteen or twenty feet above deck, hanging in the pileways, that is on the outside of the rigging. The lights on scow- A and B were burning good. There was very little north wind, not to amount to anything. The tide was ebb.

Q. Now will you just describe what you saw shortly before the accident and until the accident was over?

A. We had doors on No. 1 that opened right up, and when no wind or bad weather we don't close them, and you can sit in there and see anywheres up the river, see everything that is coming down from above. I looked up and I seen a tow coming down up

266 towards Cornwall. I could tell it was a tow by the range lights on to her, side lights and three mast headlights—pole lights, rather. She was about middle way of the river or pretty well to the west shore, I should judge, from the looks of her; she was pretty well up above. I seen a helper running around her up there,—I don't know but I suppose putting on boats off the coal dock likely. The helper come on down the river and after she come on down she kept working over towards the east shore all the time, and finally she covered up her red, port, light from my view, and the helper went on around the stern, on the east side of the tow, and I stood alongside of the house to see where they were going. She went on down and when she got down pretty near to him she sheered off this way, but didn't sheer enough to see the red light because she was too far down in between them. The tug sheered towards the westward some. Mine was the furthest west boat, and before she got down far enough she hid her light from

me. It was very dark, all I could see was lights, and shortly after she went down and got down, the tow was about alongside me, when I heard the iron begin to rattle over there and I said, "She must be on to him." Then I got down in the row boat and went over there to find out what the matter was. It was about nine o'clock then. When I got over there I found the foreward end of scow A all adrift—the upper end. No anchors was on her. I asked Robinson if the casing was gone, and he said he didn't know. We got in the boat and went to hunt for the casing, and hunted a little while but couldn't find it. I said, "It must be gone or tipped over," it was so dark we couldn't find it anyway, and then we rowed
267 ashore and notified the company. The tide, when we went in, was making flood along the shore, but there was quite a strong ebb tide in the channel yet.

Cross-examination.

By Mr. VAN ETTEN:

When I first saw the tow it was partly over towards the west side of the river, and I saw the red and green lights of the tug—pretty well up there—you could view them both. I was sitting there looking up there for quite a while, every once in a while. From the west shore where I saw them the leading tug took a course so it obscured the red light, and I never saw it again. From the time I saw her over to the westward and she obscured her red light there I saw no change in her course so that I saw the red light again; but all the time I saw her green light.

Q. How far do you say the tug went from the scow that you were on?

A. Pretty close over to the other plant, quite a distance over there. Must have been 300 feet away from me, or more, I should judge. It was pretty close over there, but being dark we couldn't just tell.

Q. You couldn't tell? You are only guessing at 300 feet? It was a dark night?

A. Yes, sir; and you couldn't measure water on a dark night with mist on it. There was a mist there. It was a good deal brighter weather than this. It was nothing like this. There is some fog in the air now, and there wasn't any fog that night, up through there. If it is misty at all you can't see Newburgh electric lights. My business before this was steamboating. I was fourteen years with the New Haven people. I have never been on tows;
268 have been on sailing vessels. I have been on this plant a little over two years.

Q. Was it your observation that there was more or less difficulty in tows passing through there?

A. Sometimes there was, according to the weather.

Q. And in rainy or dark weather when the wind was blowing was it your observation that there was more or less danger?

A. There was trouble then—in bad weather. That I had always seen since I have been there.

JOHN H. HENDERSON, sworn for plaintiff, testified:

Direct examination.

By Mr. KINDLEBERGER:

On the night of October 28th, 1908, I was on scow B at boring No. 20, the one furthest east. There was a sliding window on the west of my boat, and I set by the window reading the paper, and had a light alongside of me inside. I could look out at any time and see boats coming down the river. I saw this tow. We always expected to see her coming up there. I kept on reading and when I first looked at her I could see her red and green and white lights, but after a while I looked out again and could only see the red light, the green was shut out. She had then made a sheer to the westward a little and she was to go to the westward of me. Of course, I couldn't tell you how she was making it on the other boats, because the other boat was 200 or 300 feet from me. The tug must have been a quarter, or maybe a half mile up the river when the green light was shut out from me. Well, she
269 comes down there and the tug got by Scow A and Jim Robinson on that boat hollered to me, "Jack!" I said, "What's the matter?" He said, "I think she is going to come down on me." The tug was right abreast of him, or pretty close to him. I said, "All right, I will get my coat"—It was rainy more or less. There wasn't any wind to amount to anything, just a little light air. The tide was ebb; it sets across to the eastward, it don't run right straight. Before I got my coat on I heard the crash. There was quite a noise, iron and wood snapping and cracking there, and when it was over with, I saw his boat sliding off towards me and it was loose. The tow went by him, and Griffin then come over just after they got by and Jim and him got in the boat and went around looking for the casing and couldn't find it. The helper tug was on the east side of the tow when I first seen her. I didn't see him come around the tow; she just let go and was backing up just above me, and after the crash was she went down through us and I hollered to him, "You better stop her, or you will cut that cable off," and they stopped and she drifted down on the cable of my boat and snapped it and it was gone. I had a good light on my boat, and you could see all the lights on the other boats burning good. Generally, we could see plainly lights all over Newburgh nights when it wasn't foggy. This night was pretty clear. We could see New Windsor lights—that is four miles away, about, and I don't know but what we could see Newburgh lights; and we could see both shores and West Point, which is about three or four miles down.

270 Cross-examination.

By Mr. VAN ETTEN:

Q. You do not recall specifically this night how far you could see lights that night, that special time?

A. Not specifically, no.

Q. You are talking generally about your ability to see these lights up and down the river on ordinary nights there?

A. You could see them, yes.

Q. I say, ordinarily you could see lights at Newburgh?

A. Yes, sir; and the ferry; but this night you could not see Newburgh or the ferry lights, but you could see as far as New Windsor. I had been watchman on this boring the whole season and the season before.

Q. Had you noticed any tows coming down at night on ebb tide, to the eastward of you.

A. Yes, after they took them boats out they had been going to the eastward once in a while, but not very often—didn't make a regular practice of it. Sometimes they went by there at night. After they made the shift I remember them going down to the eastward there several nights.

Q. On ebb tide?

A. I wouldn't say about the tide, but I know they went down there nights. They did not go there as often as going between.

Q. You don't want to go on record as saying you ever saw one going down on ebb tide on the east side of you?

A. No, I couldn't swear to the tide in the night time. I spoke about sheering and I said I saw the red and green light
271 when I first saw the tug, and then as it came down the green light was cut out of my view. That would be whether she was sheering or not, the closer they got to me.

Q. So without changing her course at all it would have the effect of shutting out the green light?

A Yes, sir; if straight in front of me.

WILLIAM E. SWIFT, sworn for plaintiff, testified:

Direct examination.

By Mr. KINDLEBERGER:

I graduated from the Massachusetts Institute of Technology in 1895.

Mr. VAN ETTEN: I shall not question that he is not an expert.

The WITNESS: In October, 1908, I was employed by the Board of Water Supply of the City of New York as division or resident engineer, in charge of these borings in the river, under the department engineer.

(Referring to Plaintiff's Ex. 31 for Iden.) That drawing was made under my direction, and I signed it. I checked up the plotting and am pretty sure it is accurate.

Mr. KINDLEBERGER: I offer it in evidence.

Same admitted, marked Plaintiff's Exhibit No. 31.

That, on the dotted lines, correctly, and according to scale, indicates where scow A was after the accident.

272 Q. Did you go out to see where that scow was on the morning of the 29th of October?

A. Yes, went out in the morning, soon after 8 o'clock and saw Scow A down stream and to the eastward of her original position, and there was a line from Scow A to Scow B and the casing was not in sight. I saw the men drag for the casing and no evidence of it could be found by dragging. The distance between the easterly boring No. 20 and the east shore (scaling) is a little over 1,200 feet.

Q. Do you know how much 20 feet water there is there in that distance?

A. There is about 600 feet I should say. I can't tell exactly, but east of hole No. 20 there is about 600 feet of water 20 feet deep I should say.

Q. Did you have charge of the placing of those various boats at the spots where they worked?

A. Yes, sir; they were placed under my direction. I directed the Phœnix Construction people where to locate the borings, and they placed the boats so as to do the work at that point. We had nothing to do with the actual placing of the boats, but we fixed the position of the borings where the pipe was to be, knowing they had to put the boats next to the pipe to work. I am familiar with the terms of this Government permit under which this work was done. I know the depth of the water at the other points of the river and the widths of the channels. There were two channels, one 400 feet in the clear with 25 feet of water, and one 600 feet with 30 feet of water. The 30 foot channel is to the westward of Scow A, and the 400 foot channel is between 21 and 23 to the east of 21; and in addition there is a 20 foot channel about 600 feet to the east of No. 20. I do not care to go on record as
273 regards that 600 feet, but I know it is over 500 feet and in my judgment it is about 600.

Q. Do you know what lights were shown on these borings?

A. We were following strictly the rules of the Government inspectors, that is under the Department of Commerce and Labor, as laid down by the Department.

By the REFEREE:

Q. You may tell what the lights were?

A. White lights, boats at anchor, about 20 feet above the deck.

By Mr. KINDLEBERGER:

Q. Were those lights carried by the Phœnix Construction Company pursuant to your instruction?

Mr. VAN ETTEN: That is objected to as calling for a conclusion.

Q. What did you state to the Phœnix Construction Company about those lights?

A. We notified them as to the lights they should carry.

Mr. VAN ETTEN: I object to this.

Q. What lights did you tell them they should carry?

The REFEREE: I will admit it. Answer the question.

A. We referred to the clause in the——

Mr. VAN ETTEN: I object.

The REFEREE: Whatever instruction they gave I will admit it.

274 A. We forwarded a certain number of pamphlets issued by the Department of Commerce and Labor, with marked clauses which the local inspectors said we were to follow.

Mr. VAN ETTEN: I suppose what those clauses were would be the best evidence.

The REFEREE: Yes, it would, but this stands. It doesn't amount to anything yet until they produce the clauses; but those are the instructions you gave them?

The WITNESS: Yes, sir; that was the instruction.

Q. Now what lights were those?

A. White light. I was familiar with the arrangement by which this work was being done by the Phœnix Construction Company. I knew the various sums specified in the contracts in evidence, and I knew about the cost of doing this work, in a general way.

Q. Will you just state what you knew about it.

Mr. VAN ETTEN: I object to that as improper.

Mr. KINDLEBERGER: I am laying the foundation for evidence in relation to this transposed apportioning of the cost—that the increased cost of doing the work at first was made up at the bottom.

The REFEREE: I will take the evidence and rule on its effect afterwards.

Mr. VAN ETTEN: It may be understood that this is all taken under my objection without making specific objection to each question.

The REFEREE: Yes.

275 Mr. VAN ETTEN: And my exception.

Q. Do you know generally what was the cost of doing this work as it went down?

A. It varied so at different depths.

Q. Can you state whether or not is true that the cost at the top to the contractor was much more than at the bottom?

A. The cost for casing was very much greater near the surface, because the large first line of casing which was put in was in this case 17 inch, and that went down 240 or 250 feet, and then another line of casing inside of that. (Referring.) According to our records the 17 inch casing went down 244.7 feet. The 14 inch casing went down 445.5. The 10 inch casing went down 533.4 feet. The 8 inch casing went down 528.9 feet. And the 4 inch casing at the time of the accident was down 528.9 feet, but it had previously been abandoned 552.2 and was later pulled back, so the total depth of the hole was 552.2 feet.

By the REFEREE:

It was measured from mean high water, that is our datum on this work. It is so long ago that I had forgotten for a moment.

By Mr. KINDLEBERGER:

I am familiar with the cost of doing rock drilling as compared with this casing work; the rock drilling is much cheaper.

Q. And what was the provision of the contract as to prices about the lower depths?

Mr. VAN ETTEN: I object to it. The contract is the best evidence of that.

Mr. KINDLEBERGER: The contracts are very bulky and the witness is an expert.

276 The REFEREE: You may take his statement about it in place of the paper if you want to.

A. It was a sliding scale. The first 225 feet, as I remember it, was $15, and then for every additional 100 feet the price increased $5, until a depth of 725 feet, and from 725 feet to 1,000 feet, the contractor having the privilege of drilling 1,000 feet, the price was $50 a foot, the idea being to make it a strong incentive for the contractor to get rock and drill to the required depth.

Q. What the city was after was to determine the character of the rock?

A. It was to determine the character of the rock and to drill in the rock at the depth to which we expected to tunnel. Consequently it was a large per cent. of the cost and of the larger casing above, and what might be termed the profits were to be at the bottom as an incentive to get the contractor to give us the results that we desired. I know what rock drilling is worth when they get into rock, under ordinary circumstances; it differs in different kind of rock. I would say it varies from $5 to $7 or $8. That is what we have paid there for rock drilling. I might add to that that we have had some rock drilling done as low as $4 a foot. That is what I speak of, when I speak of the incentive between the difference in cost of rock drilling and $50 a foot. There is every effort made to make it an incentive for the contractor to complete the work and give us the information at the greatest depth.

Cross-examination.

By Mr. VAN ETTEN:

Q. How deep was the water from mean high water to the
277 bottom before you began to go into anything?

A. I could not give that exactly at that point. I should say at that point it was about 70 feet, but I might be off ten feet there. The maximum depth there is 85 feet, and it might have been 80 feet deep there—somewhere around 70 or 80 feet. Some of the larger pipe went through the water before it went into anything, but that was the understanding on which the competitive bids were obtained, to be from mean high water.

Q. That did not cost $15 to put that down through water?

A. It was the cost of the casing there. The points for drilling were given by the engineering department. We did not definitely specify the size of the boats or the scow they were to use there.

Q. You did not specify how it was to be anchored there or fastened there, did you?

A. We did take that matter up with the contractor, to be sure that the hole would not be injured by the drifting of the scows.

Q. I understand that the manner of fastening those scows you did not give the details of that to the contractors?

A. Except that we took care to see that sufficiently heavy anchors, in our judgment were placed to keep from drifting, that is all.

Q. But the manner of placing them and the length of the cables were not details that you looked after?

A. We kept close track of it. There were two scows of large dimensions, and one small one. I couldn't tell you exactly the size of the small one. As I understand it, one was 22 by 50 and
278 two were 40 by 100. The scow 22 by 50 was not as efficient as the ones 40 by 100. That could not do any of the heavy work. They had to take a big scow over when they wanted to do any heavy work. If we had to handle big pipe, or pull a casing, we had to have one of the big scows. There was heavier work on one of these holes than on another, when we got down a certain distance, because it was handling the heavy casing, and if it was necessary to pull a line of casing back and place a small driver, it could not do that work. In this case 522 feet was the maximum, and then they had pulled the four inch casing from 552 back to 528, as I remember.

Q. Now, this casing, did you learn afterwards how it was broken off, or anything about it?

A. I was there when the diver came up; we had to take his report for the condition down there. He did not find the casing; he found the hole, as I remember it where it was broken off, or where it had been bent over in the silt. He found a hole in the bed of the river which was supposed to be the hole in which the casing had been.

Q. You don't mean to say all this pipe was pulled up by this collision?

A. It disappeared—couldn't find it.

Q. Do you mean to say the whole five hundred and odd feet in depth had disappeared because of this collision?

A. I can state my conclusions; they may not be correct.

Q. I am asking you for a fact, whether this collision destroyed the whole hole and casing five hundred feet down?

A. As I say, as regards the exact conditions in the river we had to take the diver's word. He went down and couldn't find the
279 casing; it was bent over evidently and disappeared in the silt.

By the REFEREE:

Q. Suppose it had been broken off down there, was there any way in which you could have made use of what was left in the hole?

A. If it was broken below the bed of the stream, it would have been very difficult.

By Mr. VAN ETTEN:

Q. Then you say it was not broken off, but was bent over in the silt at the top?

A. I cannot go on record as stating the exact conditions down there. All we have is the diver's statement in regard to the conditions on the bottom of the river.

Q. There was no reason, then, why you could not have gone on from this same hole, with the casing in there?

A. It was absolutely impossible, because the casings in being bent over were shut together, and it is absolutely necessary to couple up the casings, because it is necessary to have a straight line of rods down to carry on the work. I mean to say that if a pipe was bent, it cannot be cut off and a casing put on and straightened up in that depth of water; it would be practically impossible. A diver couldn't go down and do that work; he couldn't cut off a casing. There is a mass of pipes flattened out.

Q. If this pipe which had been sunk 552 feet had been drawn up some 25 or 30 feet that you speak of, why couldn't it be drawn up a greater distance?

A. The inside pipe was pulled up, the four inch pipe only.

280 Q. Do you mean to say you could not have connected in some way with the four inch pipe, or inside pipe, and pulled it up?

A. It would have been absolutely impossible, because these pipes were all mashed together, and you couldn't pull one without pulling the whole bunch. We had experience of that kind.

Q. What kind of borings had you been getting out of hole 23?

A. All kinds of material; silt, clay, sand, gravel, boulders. It was not the same as we found in all the holes, they all differed.

Q. You had gone far enough in this hole to know about what it was?

A. We knew what it was that we had penetrated. We hadn't got to solid rock.

Q. Did you start in another hole after that, near there?

A. We started another hole this season, not very far from that. I couldn't tell you offhand how far. (Referring.) I can tell you exactly from this. It was about 80 feet to the east.

Q. So another hole was not put down at this point after this casing was bent over, or after this collision?

A. No, another hole would not have been put down if this had been made good. There was another one put down within 80 feet of there, to determine that rock in the middle of the stream. It would have been impossible to put down another hole in that identical spot.

By the REFEREE:

Q. You speak of putting another one down this season, you mean last season, don't you?

A. I mean 1909. That is hole 24. This last one was put

281 down to get information we hoped to get from the other one.

By Mr. VAN ETTEN:

Q. You haven't struck rock at all, have you?

A. Yes, we got a granite core out of the bottom there. Hole 23

went a total depth of 552 feet. Hole 24, put down in 1909, 80 feet to the east of it, reached a depth of approximately 708 feet, as I remember it.

By Mr. KINDLEBERGER:

In Hole 24 as I remember, we began drilling at 693 feet—to 708 feet. There was approximately 15 feet of material that required drilling.

By Mr. VAN ETTEN:

Q. I show this map or profile dated December 20, 1907, and ask you how many holes there are on that to the depth of 552 feet?

A. At that time, December 20, 1907, to a depth of 552 feet, I should say there were only 2 holes. There is one that does not appear here, that was put down—On this profile, I should say only one shows 552 feet—Hole No. 20. (Witness points out the location of that hole on the other exhibit.) That is not the boring where the accident happened.

By Mr. KINDLEBERGER:

It is to the east of it. That is the only one that things did not happen to. Hole 23 is west of hole 20.

By Mr. VAN ETTEN:

Prior to 1907, and during that season or up to that time, there had been two holes to the depth of 552 feet?

282 A. There had been two holes. The other one was about 800 feet south of this line (ind.), on the east side.

Q. Can you tell me why all these holes were discontinued at less depth?

A. Some of them were discontinued because we started with too small casing. Experience showed we had to start with a larger casing to give a sufficient number of telescopings, because we could only make a certain distance with a certain size pipe, and we didn't start with large enough pipe, so we couldn't reach the bottom. The sized pipe that we should start with was a question that was settled between the Board of Water Supply and the contractor.

Q. If this had not broken off, and they had gone down with hole 23, there would have been no necessity for hole 24, would there?

A. I would not like to say that, because I am not the chief engineer, and I do not know what would have been decided upon.

Q. But in your own estimation there would not have been any necessity for putting in another hole eighty feet from this?

A. I dislike to pass on anything that is for the chief engineer to settle.

Q. Was it your opinion that this 80 feet easterly hole was put down because of the breaking off of the other pipe?

A. It was put down because we did not have sufficient information.

Q. And that was owing to the fact that the pipe had been broken off and work discontinued on hole 23?

A. It was done because we did not have the information.

283 Q. Why didn't you have the information?
A. Because the drills had failed to reach the rock.
Q. And why had they failed to reach the rock, in your opinion?
A. Well, there is a chain of circumstances there.

By the REFEREE:

Q. If this one had not been knocked out there, it would probably have furnished you the same information?
A. We have every reason to think that it would.

Redirect examination.

By Mr. KINDLEBERGER:

Q. I show you this drawing that has been referred to, and I ask you if that represents the various borings that have been made?
A. It does. That is correct to the date February 8, 1910. Since that time the two shore borings have joined.
Q. At what depth?

Mr. VAN ETTEN: I object to it as immaterial.
Objection overruled. Exception.

A. A depth slightly in excess of minus 1400 feet.
Q. What kind of rock have you found there from the borings?
A. Granite the entire distance.
Q. What kind of rock did you take out of boring No. 24, that 15 feet?
A. Brought up pieces of granite core; similar to the granite that was found in this longitudinal boring.
Q. Now can you state what were the depths of the various holes across the river which had been obtained in October, 1908,
284 at the time of this accident, and whether or not any of them had gone into rock, and if so, how deep into the rock? Start at the east side and give the distance from the shore as you give the depth, and how far into the rock?
A. Hole 16 was about 300 feet from the east shore. That encountered rock at approximately 200 feet, and drilled 100 feet in the rock. Hole 19 was approximately 600 feet from the east shore, was carried to a depth of about 420 feet, but no drilling in the rock was done. We think we struck rock, but we didn't get sufficient core to be certain. Hole 22, approximately 800 feet from the east shore, caught the rock, I think it was 508 feet, and we drilled eighty feet into the rock. Hole 20, approximately 1260 feet from the east shore, did not reach the rock, but was carried to a distance of 626 feet approximately. Hole 24, approximately 1400 feet from the east shore, was carried a total depth of 708 feet, and there was every evidence that it was in rock the last fifteen feet. Hole 23, the one in question, was approximately 1500 feet from the east shore, and was carried to a depth of 552 feet, and no rock reached. Hole 21, which is approximately 700 feet from the west shore, was about 480 feet deep and it was in rock for approximately the last 10 feet.—what was considered to be ledge. Hole 18*a*, approximately 510

feet from the west shore, was about 400 feet deep and gave every evidence of being on ledge, although the rock was not proved. That is all the holes that were put down from the river, in the water, that appear on this map.

285 Q. Now, from the testimony that you have given, and from your knowledge of the conditions there, and assuming that the rock was reached in hole 24 at 693 feet below the surface, are you able to state approximately where the rock would have been on hole 23?

Mr. VAN ETTEN: That is objected to as speculative.

The REFEREE: If he can state it with reasonable certainty he may do so, but do not speculate about it.

A. We feel very sure that the rock in the middle of the river is approximately 700 feet below the surface of the river. That would apply to hole 23. I might add that we are sufficiently certain of that so that we have let a contract for drilling two holes at a higher elevation than the others, from the shore shafts.

Q. To meet, as the other two have met, at 1400 feet below, as testified to?

A. Yes, sir, at an elevation just below the bottom of hole 24.

Q. In making your estimate of 700 feet, you have taken into consideration the material supplied you by all the holes in question, including the angle of the rock as it went down?

A. Yes.

Mr. KINDLEBERGER: Now I will offer this plan in evidence.

Mr. VAN ETTEN: Without conceding its materiality, I will consent to it.

Same admitted, marked Plaintiff's Exhibit 32.

286 Recross-examination.

By Mr. VAN ETTEN:

All this work was for the purpose of ascertaining the depth of the rock under the river at this point.

Q. And you are satisfied, as you have already testified, that at this point in question you know the condition now as well as if the boring had been continued down there?

A. No, I do not, not at present. We are reasonably sure, but not confident.

Q. You are so sure that you have let a contract of some kind based on that assumption?

A. It is based on all the evidence we have, not on the results of one hole.

Q. And this all might have been done by making your holes from the shores, without going into the stream at all?

A. It might have been possible, but not practicable. These tests as to the depth of rock could not have been made as well from the shore as in the river, because we had no idea as to the depth of the rock, and the first assumption was that the rock was much higher

than it is, and if we had started the holes from the shore we would continually have run out of rock.

APRIL 8, 1910.

Hearing continued.

LEOPOLD HANSEN, sworn for plaintiff, testified:

Direct examination.

By Mr. KINDLEBERGER:

I am a diver, and have been for 22 or 23 years. I have worked for the Phœnix Construction Company around four years,
287 and the Merritt & Chapman Wrecking Company 12 years. In the early part of November, 1908, I went up to the Storm King plant of the Phœnix Construction Company, and I went down to the bottom twice in my diving suit on hole 23, in the middle of the river. The first time I went down I only found the hole—just found the bank, the sand where it washed up a bank and a hole, inside, and found nothing else. The sand washing out of the pipe was washed up between three and four feet. I looked for the pipe, I walked around about 100 feet all around and couldn't find nothing. The water there is about 75 or 80 feet deep. I stayed down then three-quarters of an hour. About six hours after, when the next tide was slack water, I went down the second time. I took a crow bar with me to probe down in the sand and feel around, and at last I thought I could feel a pipe with the bar about three or four feet down the hole in the center of this mound. I could find then that the pipe was flattened and bent over.

Cross-examination.

By Mr. VAN ETTEN:

Q. Then you did not locate the pipe?

A. Yes, sir; I located it. I could just feel it with the iron bar. I reported what I had located to the people there. They did not ask me to mark it in anyway, and I didn't mark it. There was no way to mark it but put a buoy there, and that would be pretty hard because the buoy wouldn't stay there, the tide would take it away. I made two divings there to find that pipe, and that's all I did.

288 By Mr. KINDLEBERGER:

I didn't find the upper part of the pipe at all; walked all around and couldn't find it no place. The bottom there was sandy, fine sand. Some places you would sink down, but it was pretty hard all over. To stay down, I carried in my suit about seventy-five pounds. The shoes weigh 18 pounds apiece.

It is stipulated that if damages be awarded in this case they shall include the following items, about which no further proof need be given:

Drive pipe, $3,040.37; 3 600-lb. mushroom anchors, $72.00; 3

1000-lb. anchors, $121.00; 2 stone anchors, $20.00; 8 500 feet anchor lines, $316.35; total material lost, $3,569.72.

Clearing away wreck—Use of Scows A and B, with crews 5 days, $334.50. (This is subject to decision of the Referee as to being a proper charge.) Diver, expense and wages, $27.50; tug hire, $50.00; telephone calls, $9.10; repairs to skiff, $10.00; total $4,000.82.

It is understood that the question of the charge for use of scows is not determined by this stipulation.

FRANCIS W. BELKNAP, recalled for plaintiff, testified:

Direct examination.

By Mr. KINDLEBERGER:

I am familiar with the various distances which the various borings attained along this line at Storm King.

289 Q. Are you able to state from your own experience as an engineer and from what you learned from these other borings what in your opinion was the depth of the rock at the place where hole 23 is?

A. There is every indication that it is under 700 feet. We were down 552 feet at the time of the accident, leaving 148 feet more of casing sinking before we struck the rock.

By the REFEREE:

That 552 feet we were paid for according to contract price. When the pipe was broken off at 552 feet we sunk another hole from the top in place of that, the next season, and that we were paid for also according to contract.

By Mr. KINDLEBERGER:

Q. Now, Mr. Belknap, have you with you the actual cost of sinking hole 23 up to the time of this accident?

A. I have the cost exclusive of any charge for plant.

Q. Will you state what that was?

Mr. VAN ETTEN: It is objected to as immaterial.

The REFEREE: I will take it subject to objection.

Mr. VAN ETTEN: I except.

A. $10,800, in round figures.

Q. How much were you paid up to that point?

A. We were paid $11,820.

Q. What was the total contract price for that hole, 1,000 feet?

Mr. VAN ETTEN: I make the same objection.

Objection overruled; exception.

290 A. $32,105, it is in the contract. That was at an average price of $32.10 a foot.

Q. Have you computed what amount would have been received by you if you had been paid the average price per foot of this hole for the depth of 552 feet?

A. Yes. The amount would be $17,953. I have often estimated what it would have cost to have completed the 148 feet casing work down to the rock.

Q. Will you state in detail, based on all facts at your disposal?

Mr. VAN ETTEN: I object to it as improper, immaterial and irrelevant.

Objection overruled; exception.

A. That would have required 148 feet of 8 inch pipe—leaving out details, somewhere in the neighborhood of $9,520, that is allowing $1,000 for discontinuing work in the Fall and reconnecting up again in the Spring. In my estimate I have figured that it would have been impossible to have completed that hole in the Fall on account of the lateness of the season. I have added to our cost $1,000 for discontinuing work in the Fall and reconnecting up in the Spring, and that figure is taken as the actual cost of discontinuing hole 24 last Fall and reconnecting it this Spring.

Q. Can you state what you would have earned under your contract by completing the hole in addition to what you received?

Same objection, ruling and exception.

A. We received $11,820, and the total contract was $32,125. The difference is $20,305.

291 Q. So if you had been permitted to have completed this hole you would have made a profit of the difference, as I understand you, between $20,305 and $9,520, or $10,785?

A. Yes, sir.

Q. In addition to that would you have been entitled to have recovered any pipe—small pipe?

A. We would have been able to have recovered pipe, yes. About $800 worth.

By the REFEREE:

Q. You mean salvage?

A. Salvage.

Mr. VAN ETTEN: How is that material? You are charging us with the pipe?

Mr. KINDLEBERGER: No; not this small pipe.

The WITNESS: That is a credit. One line of pipe goes down beyond another line, and there is only a certain portion of that that you are able to save. The 2½ inch pipe is just a casing for the drill; it has no friction on the outside of it at all. That, of course, could have been saved, and all the 6 inch, because the 6 inch wouldn't extend beyond the 8 inch more than 50 feet. A few feet of the 8 inch also would be saved. We only figured on using beyond what was asked for in this accident, about 100 feet of 8 inch, and I think about 30 of that could have been recovered. That is based on my experience on the other holes.

By the REFEREE:

Q. Now you did sink another hole, didn't you the next season?
A. Yes, sir.
Q. And you did make a profit out of that?
A. We are still working on it. We hope to make a profit on it; there is every indication of it.

292 By Mr. VAN ETTEN:

Q. You have stated that hole 24 took the place of hole 23?
A. I said that the Commission granted the contract for 24 because 23 was not completed, but that should be qualified.

By Mr. KINDLEBERGER:

Q. What qualification do you wish to make?
A. Merely that when we were granted the contract for hole 24 the chief engineer recommended that the requirements of the work required four holes, and the Water Board restricted it to one, on account of the fact that we had been unfortunate in completing any of the holes we had started on and they felt there had been enough money invested in that class of work at the present time, that is they say the chance against completing a hole made it rather expensive to award a contract for more than one.
Q. What is the arrangement as to price respecting hole 24?
A. The same price as for hole 23.

Plaintiff rests.

CHARLES E. SCOUTEN, JR., sworn for defendant, testified:

Direct examination.

By Mr. FLEMMING:

I am captain of tug, and have held a pilot's license about thirteen years. My experience generally has been up and down the Hudson river and New York Harbor. On October 28th, 1908, I was captain of the tug Primrose, and remember the occasion of the collision between the tow in charge of the steamer Osceola
293 and the drill opposite Storm King. My tug was the helper with that tow. We met the tow around Poughkeepsie and worked with her coming down the river, landing boats and putting boats on. I left the tow at Newburgh and put a boat on, then I went to Cornwall and coaled up at 8:55 and then I come direct to the tow and remained at the tail end. As we came out from Cornwall the tow was about abreast of Cornwall. The Osceola had on a hawser about 24 loaded boats, and two light ones on the hind tier. It was a misty dark night, kind of a drizzly rain.

Q. Will you describe what position the Osceola took in passing the drills at Storm King and where your tug was?

A. She come down the river and went a little to the westward of the drill boat, as she passed by she passed nearer to the westward drill boat, and as going by the tow was perfectly straight, and I stayed there watching which way she was going to swing. All of a

sudden the tail end of the tow took a sheer to the eastward, caused by the current, the tide. I immediately let go of my line and went on the port side of the tow. I got against the boat Wilson and tried to keep her off from the drills—the middle drill I believe it was, and of course I didn't have power enough to hold her out as she was coming too fast. The tide was strong ebb. There were three drills in the river at that time; one known as the west drill, the one nearest the west shore, west of the middle of the river; then one to the eastward of that, and one still further to the east. The Osceola with her tow made between the west and the middle drill.

294 The tug Primrose had been engaged in that vicinity pretty well all the season, and I was master of her. The course of down tows on ebb tide, in passing the drills at Storm King, had been a southerly course, and between the westerly and the center drill. The Osceola that night was in the usual course. Her tow was following straight behind till the second to the last tier neared the center drill, and the second hind tier came against the drill and struck the drill broadside, and the boat behind—the Hawley, I believe,—behind the Hawley was the Wilson—she struck the corner of the drill. The second loaded tier from the rear struck. In the tow there were four tiers of loaded boats, and two light ones hung on the starboard side of the tow; in the rear tier where the light boats were there was no outside port boat. There were no other vessels in the vicinity that I recall.

Q. Just tell where the tow was when your tug commenced to push over to the westward, and where you left the tow?

A. Well, the second tier of the tow, from the head end, about had passed the drill, and I see the tail end swinging a little bit, and the minute I see it swing I went to the port side. I couldn't have been pushing over five or ten minutes, and probably not that long. It was all the tug could do. I had her wide open and stood by her till we got so close that I had to push away from the drill so I would not hit the drill.

Q. During the time you were in that vicinity that season did you see any tows pass down on an ebb tide in any other course than that which you have mentioned?

A. No, sir.

Q. In your experience as a navigator, was there anything that could have been done with reference to handling of the Os-

295 ceola's tow, either by the Osceola or by your tug, which was not done on that occasion?

A. No, sir. No man living could have done it different.

Cross-examination.

By Mr. KINDLEBERGER:

Q. Now, on which side of the tow did your boat go at first after you left Cornwall?

A. I stayed at the tail end along the side of the light boats, on the starboard side, over towards the west side of the river, and just as soon as I see the tail end of the tow swing to the eastward I come

over towards the port side. The Osceola then was straight ahead; she was nearer to the west drill than to the east, and right in between the drills. The second head tier must have been down to the drill before I changed. As soon as I seen that sheer I got right around to the port side; that probably took two or three minutes. Meanwhile the tow had gone down the river I judge over 100 feet, the Osceola by that time having gotten past the boring before I got around to the port side of the tow.

Q. When did the tow first swing?

A. When the tail end in nearing the—the second tier where the Hawley was—she all of a sudden sagged to the eastward. The tow was going perfectly straight and all at once she sagged. The tug didn't change her course any, she was going perfectly straight.

Q. When did you first see the lights on the drills?

296 A. We saw lights quite a ways up, about half way down I should judge from Newburgh to Cornwall. We could see them three miles away, but you couldn't make out how they were shaped. I knew there were three drills there, by going up and down, and they carried white anchor lights.

Q. You knew they were the regulation anchor lights carried in the regulation way, didn't you?

A. Well, they was in a way. I think they could have been better.

Q. But you saw lights on this occasion?

A. Yes, sir.

Q. It was not so misty or dark that you could not see the lights all right?

A. Oh, no; you could see the lights.

Q. What power is your boat?

A. Well, she is a sixteen square. In comparison with the engines of the Osceola I would call her a motor boat. The Primrose is about 73 feet long and the Osceola is over 100 feet.

Q. When did your exhaust first show itself? When you let go of the boats?

A. She is a low pressure boat, she does not exhaust outboard.

Q. Wasn't there anything to show? Don't you exhaust on the stack?

A. No, sir, she is a low pressure boat, and that kind of a boat doesn't make a puffing noise; a high pressure boat makes a puffing noise. All these big boats are low pressure boats.

Q. Now you say the second tier from the rear was almost broadside to the drills?

A. Yes, sir.

Q. That swung around a good deal there?

A. Well, that had a tendency to shove that second tier over so that the boat behind would strike the corner of the drill.

297 Q. So the tow itself was not quite in line, then, but was a little bit twisted? One tier wasn't in line with the other tier?

A. Oh, yes, sir; it was all in line.

Q. Were the forward tiers broadside then, too?

A. They had passed by.

Q. But were they across the river?

A. No, sir; there wasn't very much of a swing there; you could hardly notice it. I noticed it in a minute because I was watching close so as to be there to stop it if I could.

Q. Well, it was enough to make the second tier broadside of the river, wasn't it?

A. Well, not exactly broadside.

Q. Well pretty near it. You said it hit broadside?

A. Yes, sir, hit broadside, sagged against it.

Q. How was the tier ahead of that? Was that pretty near broadside too?

A. That tier was going right straight ahead.

Q. So there was a different direction between the tier ahead of it and the tier that was broadside?

A. Yes, sir; a little different, because the tail end was swinging over.

By the REFEREE:

When I say broadside I don't mean the boat was east and west. It was going straight down the river, only the stern was a little further to the east.

By Mr. KINDLEBERGER:

Q. How close did the Osceola go to the west drill?

A. That would be pretty hard for me to say in the night.
298 She went nearer to the west drill than she did to the east one, on account of the current carrying to the east shore down through there. There wasn't any wind blowing, to speak of.

By Mr. FLEMMING:

Q. During the course of the Osceola before reaching the drills did she at any time shape her course to pass to the eastward of the east drill?

A. No, sir. I am working now for the Jay Street Terminal, steering one of the tugs of the Arbuckle coffee plant.

PATRICK J. WALSH, sworn for defendant, testified:

Direct examination:

By Mr. FLEMMING:

I am captain of a river boat, and was on the O. F. Hawley in tow of the Osceola on the night of October 28th, 1908, when the accident occurred off Storm King. My boat was in the third tier, I believe, on the port side. They picked me up at Albany. I was loaded with lumber. As we approached the drills off Storm King I was in the cabin, and at no time observed the course of the Osceola and tow prior to the accident. It was misting rain. Mine was the first boat that came into collision with the drill, the boat striking the drill amidship on the port side, breaking one plank on my boat; couldn't say what portion of the drill was hit. I was towing up and down the river during the season of 1908. I think that night we passed between the west drill and the middle one. I don't know

whether that is the usual course or not. I continued in the tow after passing the drill.

299 By the REFEREE:

I was in the cabin when we hit the drill. I hadn't been warned that we were likely to hit her. There was quite a noise when we hit.

MICHAEL J. HOWARD, sworn for defendant, testified:

Direct examination.

By Mr. FLEMMING:

I am master of the boat William J. Howard, and that was in the tow of the Osceola on the night of October 28th, 1908, on the starboard side of the tow. I was about deck as we approached the drills at Storm King. The weather was misty and kind of gray. I didn't pay any attention to the course of the tow before this accident happened. I know we went between the west shore drill and the center drill in the river. I have been navigating up and down the river while the drills were there.

Q. What has been the usual course of a down tow on ebb tide?

A. On the west shore of the river on ebb tide, always; in the course we were on that night. My boat was not damaged. I saw the Primrose there that night. She was laying on the tail of the tow and when it come to go by these drills the tow sagged over and he got around on the port side of the tow.

Cross-examination.

By Mr. KINDLEBERGER:

Q. Did you notice whether it was much of a sag?

300 A. Well, it was enough to do that damage.

Q. When you first noticed the Primrose on the rear how was the tow pointing?

A. The tow, one part of it was going straight and from where I was back to the tail of the tow had this slide or twist to it, toward the eastward; there wasn't much of a twist.

Q. Were you 100 feet or more towards the east of the river than those in front?

A. No, we wasn't that much; 100 feet of a twist would almost double up the tow around the drill. I couldn't exactly tell how far the twist was, the night it was. You couldn't very well guide a steamboat there or a tow from where I was, but I noticed that sliding over towards the drill. I didn't notice how far away the tug Osceola was when she passed the west drill, so I can't say if she was nearer the west drill or nearer the center one. When the Primrose started to go around the Osceola was past the drill.

JUDSON BARRETT, sworn for defendant, testified:

Direct examination.

By Mr. FLEMMING:

I am chief engineer of the Osceola, and was on October 28, 1908. I remember the night of the collision at Storm King. It was rather dark and rainy, misty night. I come on duty that night about 6:15. I could not from the engine room observe the drills or the lights on them as we came down the river; it was the wrong part of the boat. As regards the power of the Osceola, she is 4½ compound, 24 inch on her high, 42 inch on low and 36 inch stroke, between six and seven hundred horse power—a powerful tug
301 carrying 112 pounds of steam. Our boat passed down between the drill towards the westward and the middle drill, and I couldn't tell you exactly how far off we were from the west or middle drill going through there. I thought we were nearest to the west drill. I was standing in the engine-room door, on the starboard side of the boat, as we went through. I had passed up and down through there during the season of 1908, most every other day. The course that the down tows usually take on ebb tide is rather south or southwest I guess. They always passed between the drill on the westward and the middle drill, and that is the course we were on that night. There wasn't anything in connection with the management of the tow that night that led me to believe there would be any trouble with the drills. The tide was strong ebb as we came down through there.

By Mr. KINDLEBERGER:

I don't know the horse power of the Primrose. I should think it was about 200. I didn't see the collision happen, nor hear the noise of it.

APRIL 9, 1910.

Hearing resumed.

FREDERICK COYKENDALL, sworn for defendant, testified:

Direct examination.

By Mr. VAN ETTEN:

Q. Mr. Coykendall, in a number of letters which have been introduced in evidence here as correspondence between yourself and Mr. Belknap, and which began in 1906——

A. Mr. Belknap's letters would not begin in 1906, I think.
302 I believe that his correspondence would not begin until 1907, but there are others there in 1906. We were notified in 1906, some time, that the City engineers were going to place certain obstructions in the Hudson River. I took up with the City engineers several times, the question of placing these obstructions so as to give us the best chance to get through there. They eventually told me that there would be obstructions placed opposite

Storm King Mountain, and I wrote them two letters with reference to the set of the tide there and asked them to locate their obstructions so as to give us a chance to get through there with safety. Mr. Van Etten has copies of those two letters which I wrote to the engineers on that subject. Just after that, I interviewed Colonel Livermore, who was then in charge of the Hudson River, and spoke to him about the location of this obstruction. We had no trouble up to 1908, because up to that time there had been left room for us to go through, but in the spring of 1908 there were three obstructions there, and that is when I had my first conversation with Mr. Belknap, or with the Phœnix Construction Company.

Q. Now, after the collision of July 19, did you see Colonel Knight, of the United States Engineers?

A. I spoke the last time I was here, of a conversation with Mr. Belknap right after the first accident. I was in communication with him several times after that, with the object of finding out whether they intended to replace the drill where it had been knocked out, and I told him if they were I was going to try to prevent them.

303 Mr. Belknap told me he was acting under orders of the city engineers, and if he was ordered to replace the drill there he would do so. I then went to Colonel Knight, who at that time was in charge of the Hudson River, and I stated my position to him and the difficulties we would have if that drill we- replaced there. I communicated it to Mr. Belknap afterwards. I asked Colonel Knight what to do about it, and he advised me to communicate with the city engineer. He called up the chief engineer of the city, Mr. J. Waldo Smith, and later on, on the 31st of August, I met Mr. Smith and told him that the Phœnix Construction Company had said that they were going to replace these drills on his orders. I asked him what he could do about it, and he said he would send his Division Engineer to talk to me about it. The following morning, Tuesday, September 1st, Mr. Ridgway called at my office, and I asked him if he would instruct the Phœnix Construction Company not to place the drill on the westerly side at that time. He refused to do so, and said he was going to have the drill replaced. I then went back to Colonel Knight's office, on the morning of the 2nd of September, and I detailed the following circumstances to him: I told him how much traffic we had coming by there, that I estimated we had $1,000,000 a day coming by that point every day; that the channel we were obliged to use, if this drill was replaced, the largest channel we had was 600 feet wide, and that was absolutely inadequate for that traffic to pass through there, and it was certain there would be another accident. He told me the thing to do was to apply to Washington to have the permits revoked. Later

304 on that afternoon Mr. Ridgway called me on the telephone and said that he had decided not to place the other drill there until at least they were finished with the work on the easterly half of the river. I then called Mr. Belknap, on the 4th day of September, and told him I understood from the city engineers that this drill would not be replaced in the westerly side of the river until at least they had finished work on the easterly half of the river and

Mr. Belknap said that was so. That covers practically all the conversations I had with reference to the placing of the drill on the westerly half.

(By the REFEREE:)

Q. When did they put it back?

A. They did not put it back until the easterly drill was finished. Then Mr. Belknap and I at that time—I told him I thought we ought to have greater safety for our boats going through there, under any circumstances, and discussed two methods—first, placing of a light on Polopel Island and, second, supplying a tug to help tows through there. Both of these were referred to in my letters which were submitted here at the last hearing.

Q. Do you recall stating to Mr. Belknap, either in person or by letter, that the easterly side could not be used on an ebb tide?

A. I told him there were occasions when the easterly side could not be used. I so stated in one of my letters. That is all I recall about the circumstances.

Cross-examination.

By Mr. KINDLEBERGER:

Q. Do you remember when the Phœnix Construction Company started to clear up the wreck on hole 21, that was the subject
305 of Action No. 1?

A. I do not. I think shortly after the accident.

Q. Don't you know, as a matter of fact, there was something on that hole 21 continuously, either in clearing up the wreck or replacing the accident, until the time of the new accident, the subject of Action No. 3?

A. No, I do not know.

Q. You do not mean to state that there was not something there all the while, do you?

A. My impression is that it was not there continuously. I have no personal knowledge of it.

Q. So that in your previous testimony you did not mean to impress that you personally knew there was no boat there during part of the time?

A. I meant to imply there was no drill boat there, no boat at anchor which striking would hurt.

AUGUSTIN S. GILLIGAN, sworn for defendant, testified:

Direct examination.

By Mr. FLEMMING:

I am captain of a towing boat. I have been pilot on the river for about 24 years. Prior to being pilot I was deckhand; went on the river in 1881, and have been on continuously ever since. I was master of the Osceola in October, 1908, and recall the occasion of our tow colliding with a drill off Storm King on the night of the 28th. We came from Albany and had 24 boats in tow at the time of the collision; we had dropped off some boats at Newburgh, I believe, but

at this time we had 24 in tow, and all were loaded, I believe. The tow was made up in about six tiers, four wide. I had the
306 Primrose as helper. As we came down in the vicinity of Newburgh, it was ebb tide—through the drills. As to the condition of weather, it was what you call rather a bad night; it was raining and misty, and a whole lot of smoke that fall every night—it was smoky 2 years ago. As we passed down towards the drills I was at the wheel.

Q. Now, will you just state what you did in the management of your tow, from the time you left, say New Windsor, until this accident happened?

A. Well, I steered right along to the westward of the middle of the river, followed right on down around by Cornwall, and when I see that drill to the westward I steered right onto them and before I got to them altogether—I didn't want to hit with the steamboat—I sheered off so I wouldn't hit them with the boat, to go through, because the ebb tide sets off to the eastward there very strong. When the steamboat passed through I don't think we were over 100 feet, not the length of our boat, off of the west drill. My tow was straight behind me. I had two hawsers out, one on each outside boat—600 feet long.

Q. Did you have any reason to believe, from the condition of your tow as you passed through there, that you were likely to have a collision with the drill?

A. Well, after the head tier got in there I saw they were sagging off pretty fast to the eastward. The Primrose was back on the tail end, and I couldn't just tell what she was doing. She was on the port side of the tow. I kept on pulling as hard as we could, trying to clear them till the Primrose blowed me to go slow, just when the crack was. I had been navigating through there going up
307 and down all the whole time the drills were there. The usual course on ebb tide, going down, was the way I went—between the west drill and the middle one.

Q. What is your opinion as to the difficulty of navigating through there with the drills as they were located there?

A. I will say it was the worst proposition I was ever up against since steering a steamboat. It was dangerous to life and property every time you went through there. It was just good luck and chance that you would get through. I had very close calls before, but happened to get clear.

Q. Had you at any time gone to the eastward of the east drill with a down tow, on ebb tide?

A. No, sir, I wouldn't go that way, because I didn't consider it safe to go down through there that way, especially at night. The danger there, for one thing, is, when you get around in there the tide sets right on the railroad, and that point below, and you would have to put to the westward with your steamboat to clear Little Stony Point below. Walter Dyson was on deck that night and Barrett was the engineer.

Q. Now, what do you say with reference to the lights? Could you make them out?

A. The lights were dim until I got well down onto them; you couldn't see a great ways ahead. I didn't see the lights on the eastward drill until I got away down there. Of course, I didn't care about his lights so much, I was going the other way—between the westward and middle drills.

Q. Now, from your experience and from the facts as you observed them that night, was there anything that you could have done
308 with your steamer that was not done, to avoid the collision with the drills?

A. No, sir. I did the very best I could to clear them. I could not have done any different. I was coming down there in good shape, as I always did; you have got to do that—be straight.

Cross-examination.

By Mr. KINDLEBERGER:

Q. Now, aren't you mistaken when you state there were only 24 boats in that tow?

A. I don't think so.

Q. Weren't there two other light boats, making 26 in all?

A. I couldn't say whether there was 24 or 26. I don't think there were two extra boats besides the six tiers. I won't dispute the testimony of the captain of the Primrose that there were two extra boats on there. It is on my log whatever there was.

Q. Now, when was it you first saw the lights of those two westerly drills? How far above Cornwall?

A. Not a great distance above Cornwall when I saw the lights, and they were very dim then. Cornwall I don't think is as far as a mile or a mile and a quarter from the drills.

Q. You saw them when you were about a mile and a half above the drills?

A. No; I don't think it was as far as that. If it was a mile it was as far as I could see. When I first saw them I steered down to Cornwall, and be sure to get into the westward far enough and when you would see that drill then you would steer right down on to the west drill.

309 Q. Now, when do you say you changed your course so as not to hit the west drill, when you were getting down the river?

A. Oh, well, I can't tell you how many feet above it, but I was close onto the drill, because you have got to steer right on that drill as you go down in order to clear the other one to the eastward. It might be a couple of hundred feet above the drill when I changed my course.

Q. You know, don't you that when you change your course on the tug it has a tendency to swing the tow?

A. Certainly.

Q. And as a matter of fact, it did swing this tow, didn't it?

A. No.

Q. Didn't you just say a short time ago that you saw the tow was sagging very fast?

A. After we got in there, yes.

Q. Well, it must have started to swing at some time, didn't it?

A. No, if I had pulled my boat to the westward that would throw the tow to the eastward, but I didn't do that, I kept right on straight on line with that drill, until I got 200 feet and then changed the course just to clear the steamboat of the west drill.

Q. Now, when did your tow begin to sag, as you have called it?

A. The whole tow always sags there—it is bound to.

Q. Where was your boat when the tow began to sag?

A. Maybe 100 feet off the west drill. They didn't begin to sag until we was right along maybe in the middle of the tow. The
310 tugboat the head tier and the second tier then were past the drills. I had not changed the course of the tugboat from the time I made the sheer until I saw the tow begin to sag. I steered as straight as I could.

Q. You say you saw the tow sagging pretty fast. Now, just describe it?

A. Well, it sagged off there and hit that drill.

Q. Could you see it pretty plainly sagging to the east?

A. Well, of course, you could see they were going off there, yes. The tow was all about through, I should judge, when the Primrose blew to go slow. The last two lengths I couldn't tell you exactly. I was a good ways ahead. It was after the crash she blew. I would not have slowed down until they did hit. That wouldn't do any good. Before they hit, the Primrose had made no signals to me. He was back there on the tow doing what he could. I didn't make any signals to him.

Q. Now, if you had not changed your course when quite so near this boat and been straighter a little further up the river, would you not have gone through there all right?

A. I don't see how I could.

Q. You had been through there hundreds of times before all right, hadn't you?

A. Yes, sir; I went through before, just by a margin, that's all, though. I couldn't say just the number of times I had been through there, but a good many times, maybe in the hundreds. This night there was a very slight breeze of west wind blowing. I wasn't bothered by the wind; and I knew the conditions there from having been there all these times, but it was a very bad night though.
311 I will say that—smoky, and rainy and dark.

Q. Well, now, as a matter of fact, if you, instead of changing your course several hundred feet above the drills, had made that change a quarter of a mile above—just a little bit and got your tow straight, you would have gone clear, would you not?

A. No; I steered that night the same as I always do, right on that drill, and just pulled my steamboat out a little to clear her. I knew the tow would not hit the drill.

Q. But suppose, instead of steering straight on the westerly drill, you had steered say 100 feet away from it, and not changed your course at all, then you would have gone clear all right, wouldn't you?

A. 100 feet which way?

Q. To the east of 21 and gone straight down?

A. By the time you got in there, you would be a good ways off from that west drill if you did that 100 feet away, because the tide sets very strong to the eastward.

Q. Your tow was not straight behind you when it hit, was it?

A. They were all straight, yes, but going off bodily—the whole thing. There was no swing on my tow.

Q. Were not the rear tiers swinging more than the front tiers?

A. I couldn't say as they was, no. Every tier was following straight the other tier; there was no wind there, it didn't affect the tow, and I steered straight as I could so as not to do any shifting of the tail end.

Q. The captain of the Primrose has testified that the last two tiers swung off more to the eastward than the front tiers. You

312 say that is not so?

A. No, I can't say as it did. Of course, naturally the tail end might go off a little more than the head tier.

Q. Then it was not absolutely straight up and down, was it?

A. It was before we got to those drills.

Q. Now, you knew there was 800 or 900 feet of water to the eastward of 20—eastward of the east drill?

A. I didn't know the number of feet wide, but knew there was a big wide channel there.

Q. And you knew there were only three drills at this time, when there had been four before that? Have you ever gone through there to the east?

A. No, sir; never.

Q. Didn't you get instructions from your company to go down through the east there as much as possible?

A. If we thought it was safe to go that way we could have gone, but I never thought it was safe to go that way.

Q. You had gotten those instructions, hadn't you, from your company, as far as possible to go to the east, if conditions warranted it?

A. If you could, but I wouldn't go that way, and nobody else that I know of would go through that way, because I consider that more dangerous than to try to go through the middle. I couldn't tell you how long before the accident we had gotten those instructions from the company, but I never had followed them because I thought, in my own judgment, it would be safer to go through the middle.

313 Redirect examination.

By Mr. FLEMMING:

Q. Did the up tows use these channels to some extent?

A. Yes, I have been through there with an up tow in the day time.

By the REFEREE:

Q. To the east, you mean?

A. Yes, sir; I have had to do that when a tow was coming down, because two of us couldn't get through the other one. It would be safe to go through there with a flood tide, going up, in the daytime when you could see just how your tow was acting behind, but in the night I wouldn't chance it down through there at all, on an ebb tide.

By Mr. FLEMMING:

Q. What was the effect of the swing of your tow, if any, after you had changed to go to the eastward of the west drill? Which way would it swing, if at all?

A. If it swung any at all it would swing to the westward, if I pulled my boat to the eastward. I did not at any time on my course down, before coming to the drills, shape my course to pass to the eastward of the east drill. I knew the condition of the tide.

Q. Is it a fact that the strength of the tide there is uncertain or not, as you pass between the drills? That is, is the strength of the set of the tide certain or uncertain through there?

A. I always found it pretty certain, setting to the eastward.

Q. Yes, the direction is, but I mean the force of the set
314 of the tide as you come through; does that vary with the conditions?

A. Well, I don't think so. The tide sets there strong always. Of course, it would be more stronger on the strength of the ebb tide than on the first of it. The ebb tide as we went through there that night set to the eastward. I have really forgot whether it was the first or the strength of the ebb, but pretty nearly the strength of it; it might have been near the latter end. I know there was a good tide running there then. There was a slight breeze from the west, and that would affect the run of the tide if blowing hard.

WALTER E. DYSON, sworn for defendant, testified:

Direct examination.

By Mr. FLEMMING:

I was employed on the Osceola the night of October 28th, 1908, when she collided with the drills off Storm King. I was on duty that night. As we came down past and below Newburgh, and down towards the drills, I was on the forward deck until after we passed through with the tug. I don't recall the number of boats in our tow. I know the Primrose was there. I didn't have any reason to believe there would be a collision with the drills, until it happened. I am not a licensed man.

Mr. VAN ETTEN: Now, I assume that the testimony of those navigators that were called in the other case, at Newburgh, will be part of the testimony in this case?

Mr. KINDLEBERGER: There is no objection to that, except
315 that your Honor will consider the fact, in that connection, that there were only three drills in the river on the night of this accident, instead of four drills, as there were on the night of

the accident which is the subject of Action No. 1, and that fact would naturally affect their testimony.

Mr. VAN ETTEN: I have in mind more particularly as to the dangers of navigating there. If you want it, we will call some of them over again.

The REFEREE: No, I do not think that necessary.

Mr. VAN ETTEN: We will reserve the right to put one or more of them on again after we have got through with the other proof in Action No. 3.

With that exception, the defendant now rests.

FRANCIS W. BELKNAP, recalled by plaintiff in rebuttal, testified:

Direct examination.

By Mr. KINDLEBERGER:

I heard the testimony of Mr. Coykendall. In August, 1908, I wasn't in New York. I was in Maine for the first three weeks, returning to New York about the last week in August. Somewhere about the first of September, Mr. J. Waldo Smith of the City Engineering Department, sent for me.

Q. Did you have any talk with Mr. Coykendall about that time?

A. After seeing Mr. Smith. Mr. Smith said that his commission was having rather important business dealings with Mr. Coykendall's father, and he would like to accommodate Mr. Coykendall
316 about that east drill, and that if we would consent to remove it he would compensate us by allowing us to drill further into the rock when we re-located there. And I consented to move the drill and called up Mr. Coykendall and told him—in fact, made arrangements with him about using that east channel.

Q. What was the conversation with Mr. Coykendall?

A. I knew that I had absolutely no intimation whatsoever that the easterly channel would not be used entirely to the exclusion of the other channels, until the receipt of that letter of September 8th. That was my first intimation that the easterly channel would not be used altogether. At that time I had already ordered hole 22 discontinued, and the pipe was half out of it; in fact, the scow was removed from that location on the 9th of September. If it had not been for that fact I would have gone ahead with the work at hole 22.

Cross-examination.

By Mr. VAN ETTEN:

Q. Did not Mr. Coykendall advise you, in a letter of September 8th—see if you recollect this in that letter: "In accordance with your request we will, as much as possible, use the channel on the easterly half of the river, but beg to remind you that under certain conditions of wind and tide it is impossible to take tows up and down on the easterly half of the river, and that under those conditions it will still be necessary to attempt to pass between the other drills."

A. I remember that, yes, but that was my first intimation
317 that Mr. Coykendall was not going to use that channel exclusively.

Q. So you knew at that time?

A. Yes, when I got their letter I realized that the letter qualified what I considered a verbal agreement.

Rest all. Testimony closed.

318 *Notice of Appeal.*

Supreme Court, New York County.

Action No. III.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
vs.
CORNELL STEAMBOAT COMPANY, Defendant.

SIR: You will please take notice that the defendant herein, the Cornell Steamboat Company, hereby appeals to the Appellate Division of the Supreme Court of the State of New York, First Department, from a judgment made in this action and entered in the office of the Clerk of the County of New York on the 6th day of September, 1910, which judgment determines that the plaintiff recover from the defendant the sum of Nine Thousand Nine Hundred Eight & 36/100 Dollars, ($9,908.36), being the amount of damages, interest and costs, and prays that said judgment may be in all things reversed and set aside.

And it is the intention of the said defendant on this appeal to ask to review the order made in this action on the 31st day of August, 1910, granting an extra allowance of $451.99 to the plaintiff.

Dated, September 24th, 1910.

Yours, &c.,

AMOS VAN ETTEN,
Attorney for Defendant-Appellant,
22 Ferry Street, Kingston, N. Y.

319 To E. Crosby Kindleberger, Esq., Plaintiff's Attorney; William F. Schneider, Esq., County Clerk of New York County.

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Summons.

Action No. III.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
vs.
CORNELL STEAMBOAT COMPANY, Defendant.

To the Above Named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, Judgment will be taken against you by default for the relief demanded in the complaint.

Dated, New York, May 17th, 1909.

E. CROSBY KINDLEBERGER,
Plaintiff's Attorney.

Post Office Address and Office, No. 32 Franklin Street, Manhattan, New York City.

320 *Complaint.*

Supreme Court, New York County.

Action No. III.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
vs.
CORNELL STEAMBOAT COMPANY, Defendant.

The complaint of the Phœnix Construction Company, the plaintiff above-named, against the defendant above-named, alleges as follows:

I. The plaintiff is a corporation duly organized and existing under the laws of the State of New York, having its principal office and place of business in the City and County of New York.

II. On information and belief that the defendant above-named is a corporation organized and existing under the laws of the State of New York, having its principal office and place of business in the City of Kingston, County of Ulster.

III. That on the 30th day of October, 1908 and prior thereto, the plaintiff was lawfully and peacefully engaged in the performance of work upon the waters of the Hudson River opposite Storm King in boring test holes in the bottom of said Hudson River. The said work was being prosecuted by this plaintiff pursuant to employment by the Board of Water Supply of the City of New York, which Board was authorized, as plaintiff is informed and verily believes, by the

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laws of the State of New York, to determine at what place it
321 should construct an aqueduct or tunnel under the bed of the Hudson River to allow waters accumulated on the west side of said Hudson River to pass to the east side of said Hudson River and thus to be conveyed to and distributed among the inhabitants of the City of New York.

IV. On information and belief that said Board of Water Supply of the City of New York had obtained from the Secretary of War of the United States, who, by Act of Congress duly made and enacted, is given jurisdiction of the premises, a permit to make certain borings at various lines in the Hudson River, to drive piles and anchor vessels, said permit having been granted February 21, 1906 and modified on March 22, 1907 and further modified on February 24, 1908, and as so modified was in full force and effect on October 30th, 1908.

V. Plaintiff commenced the work of boring at Storm King on September 10, 1906, and as plaintiff is informed and verily believes prior to said time said Board of Water Supply of the City of New York notified the defendant as well as owners of all vessels frequently passing said borings that said work was to be carried on in that vicinity.

VI. That said work of boring pursuant to such permit was being carried on by this plaintiff on the night of October 30, 1908, there being at that time two borings in progress, known as borings Nos. 20 and 21 respectively. Said boring No. 21 was in line with boring No 20 and over seven hundred (700) feet from the west shore of the Hudson River while said boring No. 20 was about eight
322 hundred fifty (850) feet to the eastward of said boring No. 21 and over twelve hundred (1200) feet west of the east bank of the Hudson River. That at the said time there were on the Hudson River at said borings two ample channels, one being of water over twenty-five (25) feet in depth at mean low water with a width of over four hundred (400) feet, and the other of water over thirty (30) feet deep at mean low water with a width of over six hundred (600) feet in the clear, as provided in said permit of the War Department of the United States as modified on said 24th day of February, 1908. At boring No. 21 was pile driver No. 1 and at boring No. 20 was stationed scow A. On said pile driver and said scow A were watchmen in the employ of this plaintiff attending to their duties and proper lights were displayed on each of said vessels and said borings as provided by law. Each of said borings *were* composed of various lengths of wrought iron pipe. The drill on boring No. 21 had attained a depth of over four hundred eighty-six (486) feet below the surface of the Hudson River at the time of the happenings hereinafter described.

VII. On information and belief that on the night of October 30, 1908, at about the hour of 8:30 in the evening, the tide being ebb, the night being clear, but the wind blowing strong from the northwest, the steam-tug Cordts, owned and operated by the defendant, came down the Hudson River with a large number of canal boats in tow, said canal boats being fastened in tiers. The steam-tug

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Rose, owned and operated by the defendant was also seen coming down with said tow on the west side of the tow. The tow and
323 the tugs at first headed as if to pass through the channel to the west of said boring No. 21, but when within a short distance of said boring, the said steamtug Cordts suddenly and negligently changed her course and that of the tow as if to proceed to the east of said boring No. 21 and in the channel between said boring No. 21 and said boring No. 20. The change of course, however, was not made until the tug had proceeded too near the said boring No. 21. Said tug Cordts did not sufficiently change her course to the eastward or said tug Rose sufficiently push said canal boats to the eastward in the conditions of tide and wind then prevailing, for while said tug Cordts cleared said boring No. 21, the starboard side of the canal boat on the second tier from the tug hit said boring a violent blow and the other canal boats on the starboard side of the tow also scraped along it until finally the boring was completely knocked into the water until it could not be seen.

VIII. On information and belief that the damage to said boring was not caused or contributed to by the negligence of this plaintiff, its agents, servants or employés, but was wholly caused by the negligence and carelessness of the defendant, its agents, servants and employé's on board said steam-tugs Cordts and Rose.

IX. By reason of the said canal boats striking against and over said boring No. 21 as aforesaid, a large part of the piping in said boring, six anchors, six anchor lines each five hundred (500) feet long were lost, the stiff-leg and cross-brace of pile driver No. 1 was injured, expenses were incurred in the use of the pile driver, launch, diver and tug hire in clearing away the wreck and this plain-
324 tiff was prevented from completing the boring by drilling forty-eight and 7/10 (48.7) feet of casing and one hundred ninety (190) feet of diamond drilling in the rock as authorized by the contract with said Board of Water Supply, losing the compensation which would have been due it under said contract for said work, less the expense for such casing, driving and said drilling. The total amount of said damage as aforesaid is the sum of Seven thousand seven hundred sixty-two and 85/100 ($7,762.85) dollars, no part of which had been paid, although due demand therefor has been made of the defendant.

Wherefore, plaintiff demands judgment against the defendant for the sum of Seven thousand seven hundred sixty-two and 85/100 (7,762.85) dollars, with interest thereon from the 30th day of October, 1908, together with the costs of this action.

E. CROSBY KINDLEBERGER,
Attorney for Plaintiff.

Office and P. O. Address, No. 32 Franklin Street, New York City.

STATE OF NEW YORK,
County of New York, ss:

Francis W. Belknap, being duly sworn, deposes and says:
That he is the Secretary of The Phœnix Construction Company,

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the plaintiff above-named. That he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be
325 alleged upon information and belief, and as to those matters he believes it to be true.

That the reason why this complaint is not verified by the plaintiff is that said plaintiff is a corporation, and that deponent verifies the same as an officer of said corporation, and from knowledge and information derived from statements made to him by officers and agents of said plaintiff and from his personal knowledge of the business and affairs of said corporation.

FRANCIS W. BELKNAP.

Sworn to before me this 14th day of May, 1909.

[SEAL.] ARTHUR C. HUTCHESON,
Commissioner of Deeds, City of New York.

Answer.

Action No. III.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
vs.
CORNELL STEAMBOAT COMPANY, Defendant.

The defendant, Cornell Steamboat Company, for answer to the complaint of the plaintiff in this action, respectively alleges and shows to the Court:

326 First. It is admitted that the plaintiff is a corporation of the State of New York as alleged in the complaint.

Second. It is admitted that the defendant is a duly organized domestic corporation of the State of New York, having its principal office and place of business in the City of Kingston, Ulster County, New York.

Third. It is admitted that on the night of October 30, 1908, at about 8:30 in the evening, a canal boat in tow of the steam tug "Cordts," then owned and operated by the defendant, came in collision with a boring machine of the plaintiff in the navigable channel of the Hudson River, at or near Storm King and Breakneck Mountains, damaging such machine.

Fourth. Upon information and belief this defendant denies each and every of the allegations of the complainant other than as above admitted.

Fifth. Upon information and belief this defendant denies that such collision was caused by any negligence on the part of the defendant, its agents or servants operating said steam tug; but alleges that whatever damage the plaintiff sustained was caused by the negligence of the plaintiff, its agents, servants or employees.

Sixth. Upon information and belief this defendant repeating all the allegations hereinbefore stated as if the same were here re-stated and realleged, alleges that the structure of the plaintiff was unlaw-

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fully placed in the navigable waters of the Hudson River,
327 and that the plaintiff at the time of said collision was unlawfully, improperly and unnecessarily interfering with the navigation upon the Hudson River, such river being one of the navigable streams of the United States, in the State of New York.

Wherefore, this defendant prays judgment dismissing the complaint of the plaintiff, with costs of the action.

AMOS VAN ETTEN,
Attorney for Defendant.

Office and P. O. Address, 22 Ferry Street, Kingston, N. Y.

STATE OF NEW YORK,
County of Ulster, ss:

S. D. Coykendall, being duly sworn, deposes and says, that he is President of the Cornell Steamboat Company, the defendant in this action; that he has read the foregoing answer and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Deponent further says, this verification is made by him because the defendant is a corporation and deponent is an officer thereof, to wit: President.

S. D. COYKENDALL.

328 Sworn to before me this 26th day of June, 1909.

HERMON T. WOOD,
Notary Public.

Stipulation.

Supreme Court, New York County.

Action No. III.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
vs.
CORNELL STEAMBOAT COMPANY, Defendant.

The Clerk of the County of New York, having hereto on Oct. 4, 1909, made an order pursuant to stipulation signed by the attorneys of the parties herein, appointing Harrington Putnam, Esquire, Referee in the above entitled case, pursuant to Section 1011 of the Code of Civil Procedure of the County of New York, and said Har-ington Putnam, being thereafter disqualified to act as such Referee, by being appointed a Justice of the Supreme Court of the State of New York:

Now, pursuant to the provisions of Section 1011 of the Code of Civil Procedure of the State of New York, it is hereby stipulated and agreed by and between the attorneys for the plaintiff and de-

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fendant in the above entitled action that the said action,
329 now pending in this Court, to recover damages for the alleged negligence of the defendant, and now being on the Trial Calendar of this Court of the County of New York, numbered 5668, be referred to Charles F. Brown, Esquire, Attorney and Counselor at Law, of No. 60 Wall Street, in the County of New York, to hear and determine all the issues in said action, both of fact and of law, and to exercise all the powers of a Referee as set forth in the Code of Civil Procedure.

It is further stipulated that an order carrying out the terms of this stipulation be entered without further notice.

Dated, December 17, 1909.

E. CROSBY KINDLEBERGER,
Attorney for Plaintiff.
AMOS VAN ETTEN,
Attorney for Defendant.

330 *Order.*

Supreme Court, New York County.

Action No. III.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
vs.
CORNELL STEAMBOAT COMPANY, Defendant.

Upon reading and filing the annexed stipulation signed by the attorneys for the parties hereto, consenting to the appointment of Charles F. Brown, Esquire, Attorney and Counselor at Law, as Referee to hear and determine all the issues in the above entitled action, and that an order appointing said Mr. Charles F. Brown, may be entered without further notice, upon motion of E. Crosby Kindleberger, Attorney for the plaintiff herein, it is

Ordered, that Charles F. Brown, Attorney and Counselor at Law, of No. 60 Wall Street, Borough of Manhattan, City of New York, be and he hereby is appointed Referee to hear and determine the whole issues in the above entitled action, both of fact and of law, and to render his decision upon the same, and file it with the Clerk of this Court, and to exercise all the general powers of a Referee, as prescribed by the Code of Civil Procedure.

Dated, New York, Dec. 17, 1909.

PETER J. DOOLING, *Clerk.*

331 *Decision.*

Supreme Court, New York County.

Action No. III.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
vs.
CORNELL STEAMBOAT COMPANY, Defendant.

To the Supreme Court of the State of New York:

Pursuant to an order of this Court entered herein on the 17th day of December, 1909, referring it to me to hear and determine the whole issues in the above entitled action, both of fact and of law and to render my decision upon the same, and to exercise all the general powers of a referee prescribed by the Code of Civil Procedure, I the undersigned as referee report: That the parties whose interest could be effected by the result of the reference being corporations and present by attorneys, the referee's oath was expressly waived. I thereupon heard the allegations and evidence of the parties being attended by E. Crosby Kindleberger, Esq., of counsel for plaintiff, and by Amos Van Etten, Esq., and Harry H. Flemings, Esq., of counsel for defendant. That during the trial, the counsel for plaintiff moved to amend the complaint to conform to the proof, so that the same should allege that the damages sustained by the plaintiff was $9,029.86 instead of $7,762.85 as alleged in the original complaint, and I thereupon ordered the complaint to be amended accordingly.

332 Now, after hearing E. Crosby Kindleberger, Esq., attorney for the plaintiff and Amos Van Etten, Esq., attorney for the defendant, and due deliberation having been had, I decide and find as follows:

Findings of Fact.

I. The plaintiff is a corporation organized and existing under the laws of the State of New York, having its principal office in the County of New York.

II. The defendant is a corporation organized and existing under the laws of the State of New York, having its principal office in the County of Ulster, City of Kingston.

III. Prior to and at the time of the collision, the subject of this action, the Board of Water Supply of the State of New York under authority of a statute of the State of New York was engaged in making test borings in the bed of the Hudson River near Storm King.

IV. That the making of such test borings was part of a great public improvement to wit: a part of the work of the construction of an aqueduct to supply the inhabitants of the City of New York with pure water.

V. That the Board of Water Supply of the City of New York,

prior to the happening of this collision, had duly made a contract with the American Diamond Rock Drill Company, that said contract was thereafter modified and that thereafter said contract was duly assigned to this plaintiff by the American Diamond
333 Rock Drill Company, such assignment receiving the consent of the Board of Water Supply of the City of New York.

VI. That after the contract had been assigned to the plaintiff, the plaintiff proceeded with the work of making these test borings at Storm King aforesaid, using its own plant and employing its own workmen.

VII. That thereafter and prior to the happening of the collision, the Board of Water Supply of the City of New York made a further modification of this contract by agreement with the plaintiff.

VIII. That prior to the making of the test borings the Board of Water Supply of the City of New York made an application to the Chief of Engineers of the United States Army to drive pipes and anchor vessels near New Hamburg and that the granting of this application was recommended by the Chief of Engineers of the United States Army, and permission to do this work was granted by Robert S. Oliver, Acting Secretary of War on the 2nd day of February, 1906.

IX. That thereafter application was made by the Board of Water Supply of the City of New York to change the location of the borings from New Hamburg to Storm King and on the 22nd day of March, 1907, Colonel Lockwood of the Corps of Engineers of the United States Army wrote the Board of Water Supply of the City of New York that by the authority of the Secretary of War the
334 permit of July 2nd, 1906, was modified so as to permit the work to be carried on at Storm King.

X. That on the 24th day of February, 1908, Colonel John G. D. Knight of the Corps of Engineers of the United States Army, signed a letter granting permission to the Board of Water Supply of the City of New York to anchor vessels at the Storm King Line. In the said letter it was provided that there should not be in progress simultaneously on said line, more than four borings, and that there should be left unobstructed during the progress of the boring work two channels, one of at least 25 feet depth at mean low water with a width of at least 400 feet in the clear, and the other of at least 30 feet depth at mean low water and with a width of at least 600 feet in the clear.

XI. That at the time of the happening of this collision, there was to the west of Boring No. 21, a channel over six hundred feet in width and of a depth of at least thirty feet at mean low water and between borings 21 and 23 there was a channel of at least 400 feet in width of water at least 25 feet in depth at mean low water.

XII. That the channels here above described in the XI. finding were sufficient for the passage of vessels and tows and that a large number of tows and vessels had safely passed through said channels between the borings during the years 1907 and 1908.

XIII. That prior to the collision, the defendant had been notified

of the location of each of the vessels of the plaintiff at each of the borings.

335 XIV. That the defendant was familiar with the position of the vessels of the plaintiff at each one of the borings.

XV. That officials of the United States Government had prescribed that during the night, white anchor lights should be maintained upon each vessel located at each of the borings.

XVI. That on the night in question, the plaintiff maintained proper and adequate white lights upon each one of its vessels at each one of the borings.

XVII. That on the night on which the collision occurred the lights maintained by the plaintiff on each of its vessels located at the respective borings were visible for several miles in all directions and were seen by the Captain of the tug Cordts for over a mile away.

XVIII. That on the night of October 30, 1908, the following borings were in position on the line at Storm King: Boring No. 21 which was 718 feet from the west shore of the Hudson River and Boring No. 20 which was 841 feet east of Boring No. 21 and 1232 feet west from east bank of the Hudson River.

XIX. The following vessels of the plaintiff were located at and near the following borings on the night of October 30, 1908: Boring No. 21, pile driver No. 1 and scow A about 300 feet south of Boring No. 20.

336 XX. That each of the vessels mentioned in finding No. XIX. were securely anchored with their bows and sterns up and down stream and their position was fixed.

XXI. That at Boring No. 21 the plaintiff had been drilling in the rock prior to the collision, and upon the day of the collision had been putting in some pipe to protect the drill from being scratched by sand.

XXII. That at the time of the collision the plaintiff had attained a depth of 486 feet below the surface of the water.

XXIII. That on the night of October 30, 1908, at the time the collision happened the tide was running strong ebb and there was a strong wind blowing from the northwest which caused the waves to come over the bow of pile driver No. 1.

XXIV. That at and near Boring No. 21, the ebb tide sets towards the east with a tendency to carry vessels and other objects in a southeasterly direction.

XXV. That the tug Cordts, a powerful tug of 130 feet in length and of a tonnage of 194 gross tons, was the leading tug of the defendant's tow that collided with Boring No. 21 on the night of October 30, 1908.

XXVI. That back of the tug, on a long hawser were 11 canal boats made up two in a tier, there being five full tiers and the 11th boat being on the port side of the tow.

XXVII. That the 11 canal boats were all loaded and that the average loaded canal boat with its cargo weighed 300 tons.

337 XXVIII. That in changing the course of a loaded tow time must be given to shape the course.

XXIX. That Captain Elmendorf who commanded the defend-

ant's tug Cordts was well aware of the location of the plaintiff's borings and vessels as his tow approached the borings.

XXX. That the tug Cordts passed Boring No. 21 about 100 feet to the east of the boring.

XXXI. That the captain of the tug Cordts in fixing his course so close to Boring No. 21 under the circumstances, was negligent and that fact was the main cause of the collision.

XXXII. That the captain of the tug Cordts did not sufficiently allow for the effect of the tide.

XXXIII. That the captain of the tug Cordts did not sufficiently calculate the effect of the strong wind that was then blowing.

XXXIV. That the captain of the tug Cordts changed the course of his tug to the eastward shortly before the happening of the collision, and thus swung the tail of his tow to the westward.

XXXV. That the change of the course described in the finding XXXIV. was, under the circumstances, negligent and contributed to the happening of the collision.

XXXVI. That the captain of the tug Rose, owned by the defendant, was on the west side of the tow when approaching the boring.

XXXVII. That not until a few minutes before the happening of the collision did the tug Rose change from the west side
338 of the tow to the east side and attempt to push the tow over towards the east.

XXXVIII. That from its position on the west side of the tow, the tug Rose was about to do nothing to prevent the tail of the tow from swinging towards the westward.

XXXIX. That the captain of the tug Rose was negligent in not sooner proceeding to the east of the tow and in not sooner pushing the tail of the tow over towards the eastward.

XL. That the starboard side of the canal boat on the starboard side of the tow, two tiers from the front, hit pile driver No. 1 and boring No. 21, a violent blow, and that the other canal boats on the starboard side of the tow also hit against said boring and said pile driver.

XLI. That the force of collision broke anchor lines, the "stiff leg" on pile driver No. 1 and drove said pile driver to the south.

XLII. That the force of the collision bent the pipe composing boring No. 21 over towards the south at a point about 68 feet below the surface of the water and about 12 feet above the bottom of the Hudson River. That the top of the pipe so bent rested upon the bottom of the Hudson River.

XLIII. That where the pipe had been bent as described in Finding No. XLII. it was so bent as to make it impossible to continue working upon said boring.

XLIV. That as a result of the collision a large amount of
339 drive pipe was lost of the value of $1,363.51.

XLV. That anchors were lost, also anchor lines, and the service of a pile driver of the plaintiff was required with the wages of the men connected with the same, diver's expenses were required,

were hired, telephone calls were needed and the stiff leg of the driver was damaged.

LVI. That the total damages sustained by the plaintiff from the ision for the items mentioned in the findings XLIV. and XLV. e $2,189.86.

LVII. That as a result of the collision it became necessary for plaintiff to abandon further work under its contract with the rd of Water Supply of the City of New York upon boring No. 21.

LVIII. Under the contract between the plaintiff and the Board Water Supply of the City of New York, the plaintiff was entitled proceed with boring No. 21 until a depth of 725 feet below the face of the water should have been reached.

LIX. That for the 486 feet which had been already attained at time of the collision, the cost to the plaintiff had been $14,200.00 the plaintiff had been paid by the Board of Water Supply of the y of New York but $9,705.00.

. That the total contract price for the entire 725 feet was $18,-5.00.

LI. That the compensation of the plaintiff was so ar-) ranged at the beginning of the work that the expenses of performing the work at the beginning were greater than the mpensation provided for in the contract for that part of the work.

LII. That the compensation provided for in the contract for ring hole No. 21 was as follows:

$15.00 a foot for the first 225 feet.
20.00 " " from 226-325 feet.
30.00 " " " 326-425 "
35.00 " " " 426-525 "
40.00 " " " 526-625 "
45.00 " " " 626-725 "

LIII. To complete the boring, but five feet more of casing work s required to protect the diamond drill from the action of the nd that was found at that point, and that the reasonable cost of ing this casing work was $175.00.

LIV. That to finish the hole would have required 234 feet of amond drill work and that the fair and reasonable cost of diamond ill work at boring No. 21 and at the depth of said boring was $6.00 foot.

LV. That the entire cost of completing the boring including the ir charge of $250.00 for removing the pipe from the river after e completion of the work was $1,830.00.

LVI. That if the boring had been completed by the plaintiff it ould have been entitled to receive under the terms of the contract addition to what it had already been paid the sum of $8,670.00.

41 LVII. That if the plaintiff had completed boring No. 21 it would have received as profits over and above the cost of mpleting the boring, the sum of $6,840.00.

LVIII. That neither the plaintiff nor any of its servants or em-loyees did or performed any negligent acts that contributed to the llision.

Conclusions of Law.

I. That the agents, servants and employees of the defendant were guilty of such negligence as entitles the plaintiff to recover damages it sustained thereby.

II. That the plaintiff is entitled to recover as damages, cost of repairing its pile driver, the amount of materials lost, the cost of clearing up the wreck and the other items mentioned in findings XLIV and XLV amounting to $2,189.86.

III. That the plaintiff is entitled to recover in addition to its other damages on account of the collision, the profits which it lost upon its contract to bore hole No. 21, which said profits were proven with reasonable certainty to amount to $6,840.00.

I accordingly direct judgment for plaintiff against defendant for the sum of $9,029.86, with costs to be taxed.

Dated, August 15, 1910.

CHARLES F. BROWN, *Referee.*

342 *Requests to Find.*

New York Supreme Court.

Action No. III.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
vs.
CORNELL STEAMBOAT COMPANY, Defendant.

This action having been tried before a referee without a jury, the above defendant requests the Referee to find:

As Matters of Fact.

The Requests to Find as set forth in the Requests submitted in Action No. 1 herein, and numbered respectively as follows:

I, II, IV, V, VI, VII, VIII, IX, X, XIII, XIV, XXII, XXIV, XXVI, XXVII, and in addition thereto:—

I make the same findings as in Action No. 1. C. F. B.

III. On the 30th day of October, 1908, the plaintiff had anchored in the navigable waters of the Hudson River at and opposite Storm King Mountain, at the lower end of Newburgh Bay, certain boring plants for the purpose of testing the bottom of the Hudson River at that point.

Found. C. F. B.

XI. The evidence does not show that the Board of Water Supply of the City of New York had obtained from the Secretary of
343 War of the United States a lawful permit to make borings and anchor vessels in the Hudson River at and opposite Storm King Mountain on said 30th day of October, 1908.

Found. C. F. B.

XII. On October 30th, 1908, in the evening at about nine o'clock, there were two plants located in the navigable waters of the Hudson River at and opposite Storm King Mountain. The most westerly plant was known as No. 21, which was located about 750 feet from the water-line of the west shore of the river, and easterly of such plant was plant known as No. 20.

Refused except as found in decision. C. F. B.

XV. Plant No. 21 had been located and placed in the river about the 1st of April, 1908.

Found. C. F. B.

XIX. The only fault or negligence charged against the defendant in colliding with plant No. 21 is, "The said steam tug 'Cordts' suddenly and negligently changed her course," as she approached these boring plants.

Refused. C. F. B.

XX. The plaintiff did not show by competent evidence any lack of skill or diligence on the part of the master of the tug "Cordts" or those navigating the fleet.

Refused. C. F. B.

XXI. The plaintiff's evidence cannot be construed to show more than an error of judgment on the part of those navigating the tug and tow.

Refused. C. F. B.

344 XXIII. It was not negligence on the part of the captain of the "Cordts" to change or modify his course in approaching these drills, if, in his opinion and good judgment, a change was proper when it for the first time appeared that there was any danger.

Refused. C. F. B.

XXVIII. It does not appear that the plaintiff made any application to the Board of Water Supply of the City of New York for payment of the work done at the time of the collision, or for their so-called prospective profits.

Found. C. F. B.

XXIX. No attempt was made by the plaintiff to repair the damages sustained by the collision.

Refused. C. F. B.

XXX. It does not appear that the plaintiff, prior to the bringing of this action, had made any demand upon the Board of Water Supply of the City of New York for payment of the damages sustained by them growing out of this collision.

Found. C. F. B.

As Matters of Law.

I. The plaintiff in this action cannot recover upon any other charge of negligence than that set forth in the complaint.

Found. C. F. B.

II. The happening of a collision between this tow and the derrick was not, under the circumstances, prima facie evidence of negligence.

Refused. C. F. B.

345 III. Every presumption to be drawn from the evidence in this case is in favor of an absence of fault on the part of those navigating the tug.

Refused. C. F. B.

IV. The evidence of the navigators and those in command of the tug, as to proper navigation, is entitled to more weight than the evidence of those on the drills.

Refused. C. F. B.

V. A mere error of judgment on the part of the captain or navigators of this fleet did not constitute negligence.

Found. C. F. B.

VI. Without any evidence of a competent witness showing that under like circumstances a navigator using ordinary skill and care would have done differently, there was a failure of proof to show negligence on the part of those navigating this fleet.

Refused. C. F. B.

VII. There was no proper, sufficient, or legal evidence showing loss of profits to the plaintiff.

VIII. Plaintiff's complaint should be dismissed, with costs.

Refused except as found in decision. C. F. B.

AMOS VAN ETTEN,
Attorney for Defendant.

346 *Exceptions.*

Supreme Court, New York County.

Action No. III.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
vs.
CORNELL STEAMBOAT COMPANY, Defendant.

The defendant, the Cornell Steamboat Company, excepts to the Findings of Fact determined by the Referee as follows:

I. Exception is taken to the third Finding of Fact that prior to and at the time of the collision, the subject of this action, the Board of Water Supply of the State of New York under authority of a statute of the State of New York was engaged in making test borings in the bed of the Hudson River near Storm King.

II. Exception is taken to so much of the fourth Finding of Fact as finds, "That the making of such test borings was part of a great public improvement."

III. Exception is taken to so much of the fifth Finding of Fact as finds that the contracts therein referred to were duly made and duly assigned, and to such part as finds, "such assignment receiving the consent of the Board of Water Supply of the City of New York."

IV. Exception is taken to the seventh Finding of Fact, "That thereafter and prior to the happening of the collision, the Board of Water Supply of the City of New York made a further modi-
347 fication of this contract by agreement with the plaintiff."

V. Exception is taken to the Eighth Finding of Fact,

"That prior to the making of the test borings the Board of Water Supply of the City of New York made an application to the Chief of Engineers of the United States Army to drive pipes and anchor vessels near New Hamburg and that the granting of this application was recommended by the Chief of Engineers of the United States Army, and permission to do this work was granted by Robert S. Oliver, Acting Secretary of War on the 2nd day of February, 1906," generally and specifically for the reason that said finding is a finding setting forth certain testimony and not a finding of fact founded upon the testimony.

VI. Exception is taken to the ninth Finding of Fact, "That thereafter application was made by the Board of Water Supply of the City of New York to change the location of the borings from New Hamburg to Storm King and on the 22nd day of March, 1907, Colonel Lockwood of the Corps of Engineers of the United States Army wrote the Board of Water Supply of the City of New York that by the authority of the Secretary of War the permit of July 2nd, 1906, was modified so as to permit the work to be carried on at Storm King," generally and specifically for the reason that said finding is a finding setting forth certain testimony and not a finding of fact founded upon the testimony.

VII. Exception is taken to the tenth Finding of Fact, "That on the 24th day February, 1908, Colonel John G. D. Knight
348 of the Corps of Engineers of the United States Army, signed a letter granting permission to the Board of Water Supply of the City of New York to anchor vessels at the Storm King Line. In the said letter it was provided that there should not be in progress simultaneously on said line, more than four borings, and that there should be left unobstructed during the progress of the boring work two channels, one of at least 25 feet depth at mean low water with a width of at least 400 feet in the clear, and the other of at least 30 feet depth at mean low water and with a width of at least 600 feet in the clear," generally and specifically for the reason that said finding is a finding setting forth certain testimony and not a finding of fact founded upon the testimony.

VIII. Exception is taken to the eleventh Finding of Fact, "That at the time of the happening of this collision, there was to the west of boring No. 21, a channel over six hundred feet in width and of a depth of at least thirty feet at mean low water and between borings 21 and 23 there was a channel at least 400 feet in width of water at least 25 feet in depth at mean low water."

IX. Exception is taken to the twelfth Finding of Fact, "That the channels here above described in the XI. finding were sufficient for the passage of vessels and tows and that a large number of tows and vessels had safely passed through said channels between the borings during the years 1907 and 1908."

X. Exception is taken to the thirteenth Finding of Fact, "That prior to the collision, the defendant had been notified of the
349 location of each of the vessels of the plaintiff at each of the borings."

XI. Exception is taken to the fourteenth Finding of Fact, "That

the defendant was familiar with the position of the vessels of the plaintiff at each one of the borings."

XII. Exception is taken to the fifteenth Finding of Fact, "That officials of the United States Government had prescribed that during the night, white anchor lights should be maintained upon each vessel located at each of the borings."

XIII. Exception is taken to the sixteenth Finding of Fact, "That on the night in question, the plaintiff maintained proper and adequate white lights upon each one of its vessels located at each one of the borings."

XIV. Exception is taken to the seventeenth Finding of Fact, "That on the night on which the collision occurred the lights maintained by the plaintiff on each of its vessels located at the respective borings were visible for several miles in all directions and were seen by the Captain of the tug Cordts for over a mile away."

XV. Exception is taken to the eighteenth Finding of Fact, "That on the night of October 30, 1908, the following borings were in position on the line at Storm King: Boring No. 21 which was 718 feet from the west shore of the Hudson River and Boring No. 20 which was 841 feet east of Boring No. 21 and 1232 feet west from the east bank of the Hudson River."

XVII. Exception is taken to the twenty-fourth Finding of
350 Fact, "That at and near boring No. 21, the ebb tide sets towards the east with a tendency to carry vessels and other objects in a southeasterly direction."

XVIII. Exception is taken to the twenty-sixth Finding of Fact, "That back of the tug, on a long hawser were 11 canal boats made up two in a tier, there being five full tiers and the 11th boat being on the port side of the tow."

XIX. Exception is taken to the twenty-seventh Finding of Fact, "That the 11 canal boats were all loaded and that the average loaded canal boat with its cargo weighed 300 tons."

XX. Exception is taken to the twenty-eighth Finding of Fact, "That in changing the course of a loaded tow time must be given to shape the course."

XXI. Exception is taken to the twenty-ninth Finding of Fact, "That Captain Elmendorf who commanded the defendant's tug Cordts was well aware of the location of the plaintiff's borings and vessels as his tow approached the borings."

XXII. Exception is taken to the thirty-first Finding of Fact, "That the Captain of the tug Cordts in fixing her course so close to boring No. 21 under the circumstances, was negligent and that fact was the main cause of the collision."

XXIII. Exception is taken to the thirty-second Finding of Fact, "That the Captain of the tug Cordts did not sufficiently allow for the effect of the tide."

XXIV. Exception is taken to the thirty-third Finding of
351 Fact, "That the Captain of the tug Cordts did not sufficiently calculate the effect of the strong wind that was then blowing."

XXV. Exception is taken to the thirty-fourth Finding of Fact, "That the Captain of the tug Cordts changed the course of the tug to

the eastward shortly before the happening of the collision, and thus swung the tail of his tow to the westward."

XXVI. Exception is taken to the thirty-fifth Finding of Fact, "That the change of the course described in the Finding XXXIV. was, under the circumstances, negligent and contributed to the happening of the collision."

XXVII. Exception is taken to the thirty-sixth Finding of Fact, "That the captain of the tug Rose, owned by the defendant, was on the west side of the tow when approaching the boring."

XXVIII. Exception is taken to the thirty-seventh Finding of Fact, "That not until a few minutes before the happening of the collision did the tug Rose change from the west side of the tow to the east side and attempt to push the tow over towards the east."

XXIX. Exception is taken to the thirty-eighth Finding of Fact, "That from its position on the west side of the tow, the tug Rose was about to do nothing to prevent the tail of the tow from swinging towards the westward."

XXX. Exception is taken to the thirty-ninth Finding of Fact, "That the captain of the tug Rose was negligent in not sooner
352 proceeding to the east of the tow and in not sooner pushing the tail of the tow over towards the eastward."

XXXI. Exception is taken to the fortieth Finding of Fact, "That the starboard side of the canal boat on the starboard side of the tow, two tiers from the front, hit pile driver No. 1 and boring No. 21, a violent blow, and that the other canal boats on the starboard side of the tow also hit against said boring and said pile driver."

XXXII. Exception is taken to the forty-second Finding of Fact, "That the force of the collision bent the pipe composing boring No. 21 over towards the south at a point about 68 feet below the surface of the water and about 12 feet above the bottom of the Hudson River. That the top of the pipe so bent rested upon the bottom of the Hudson River."

XXXIII. Exception is taken to the forty-third Finding of Fact, "That where the pipe had been bent as described in Finding No. XLII., it was so bent as to make it impossible to continue working upon said boring."

XXXIV. Exception is taken to the forty-fourth Finding of Fact, "That as a result of the collision a large amount of drive pipe was lost of the value of $1,363.51."

XXXV. Exception is taken to the forty-fifth Finding of Fact, "That anchors were lost also anchor lines, and the service of a pile driver of the plaintiff was required with the wages of the men connected with the same, diver's expenses were required, tugs
353 were hired, telephone calls were needed and the stiff leg of the pile driver was damaged."

XXXVI. Exception is taken to the forty-sixth Finding of Fact, "That the total damages sustained by the plaintiff from the collision for the items mentioned in the findings XLIV. and XLV. were $2,189.86."

XXXVII. Exception is taken to the forty-seventh Finding of Fact, "That as a result of the collision it became necessary for the

plaintiff to abandon further work under its contract with the Board of Water Supply of the City of New York upon boring No. 21."

XXXVIII. Exception is taken to the forty-eighth Finding of Fact, "After the contract between the plaintiff and the Board of Water Supply of the City of New York, the plaintiff was entitled to proceed with boring No. 21 until a depth of 725 feet below the surface of the water should have been reached."

XXXIX. Exception is taken to the forty-ninth Finding of Fact, "That for the 486 feet which had been already attained at the time of the collision, the cost to the plaintiff had been $14,200.00 and the plaintiff had been paid by the Board of Water Supply of the City of New York but $9,705.00."

XL. Exception is taken to the fiftieth Finding of Fact, "That the total contract price for the entire 725 feet was $18,375.00."

XLI. Exception is taken to the fifty-first Finding of Fact, "That the compensation of the plaintiff was so arranged at the
354 beginning of the work that the expenses of performing the work at the beginning were greater than the compensation provided for in the contract for that part of the work."

XLII. Exception is taken to the fifty-second Finding of Fact, "That the compensation provided for in the contract for boring hole No. 21 was as follows:

$15.00	a foot	for the first	225	feet
20.00	" "	from	226-325	feet
30.00	" "	"	326-425	"
35.00	" "	"	426-525	"
40.00	" "	"	526-625	"
45.00	" "	"	626-725	"

XLIII. Exception is taken to the fifty-third Finding of Fact, "To complete the boring, but five feet more of casing work was required to protect the diamond drill from the action of the sand that was found at that point, and that the reasonable cost of doing this casing work was $175.00."

XLIV. Exception is taken to the fifty-fourth Finding of Fact, "That to finish the hole would have required 234 feet of diamond drill work and that the fair and reasonable cost of diamond drill work at boring No. 21 and at the depth of said boring was $6.00 a foot."

XLV. Exception is taken to the fifty-fifth Finding of Fact "That the entire cost of completing the boring including the fair charge of $250.00 for removing the pipe from the river after completion of the work was $1,830.00."

355 XLVI. Exception is taken to the fifty-sixth Finding of Fact, "That if the boring had been completed by the plaintiff it would have been entitled to receive under the terms of the contract in addition to what it had already been paid the sum of $8,670.00."

XLVII. Exception is taken to the fifty-seventh Finding of Fact, "That if the plaintiff had completed boring No. 21 it would have

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received as profits over and above the cost of completing the boring, the sum of $6,840.00."

XLVIII. Exception is taken to the fifty-eighth Finding of Fact, "That neither the plaintiff nor any of its servants or employees did or perform any negligent acts that contributed to the collision."

XLIX. The defendant excepts generally to each and all of the Findings of Fact upon the ground that they set forth certain testimony given on the trial and are not findings of fact based upon the testimony.

This defendant excepts to the Conclusions of Law as found by the Referee, as follows:

1. To the first Conclusion of Law, that the agents, servants and employees of the defendant were guilty of such negligence as entitles the plaintiff to recover damages it sustained thereby.

2. To the second Conclusion of Law, that the plaintiff is entitled to recover as damages, cost of repairing its pile driver, the amount of materials lost, the cost of clearing up the wreck and the other items mentioned in findings XLIV. and XLV., amounting to $2,189.86.

356 3. To the third Conclusion of Law, that the plaintiff is entitled to recover in addition to its other damages on account of the collision, the profits which it lost upon its contract to bore hole No. 21, which said profits were proven with reasonable certainty to amount to $6,840.00.

This defendant further excepts to the refusal of the Referee to find as matters of fact the following Requests made by the defendant:

I. Exception is taken to the refusal of the Referee to find the ninth Request to Find that plaintiff has failed to show that it had authority from the legislature of the State of New York to anchor and maintain its drilling plants and barges at the place or places where they were injured.

II. Exception is taken to the refusal of the Referee to find the tenth Request to Find that the evidence fails to show that the plaintiff was lawfully engaged in the performance of work upon the waters of the Hudson River opposite Storm King.

III. Exception is taken to the modification of the twelfth Request to Find that on October 30th, 1908, in the evening at about nine o'clock, there were two plants located in the navigable waters of the Hudson River at and opposite Storm King Mountain. The most westerly plant was known as No. 21, which was located about 750 feet from the water-line of the west shore of the river, and easterly of such plant was plant known as No. 20.

IV. Exception is taken to the refusal of the Referee to find the nineteenth Request to Find that the only fault or negligence
357 charged against the defendant in colliding with plant No. 20 is, "The said steam tug 'Cordts' suddenly and negligently changed her course," as she approached these boring plants.

V. Exception is taken to the refusal of the Referee to find the twentieth Request to Find that the plaintiff did not show by competent evidence any lack of skill or diligence on the part of the master of the tug "Cordts" or those navigating the fleet.

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VI. Exception is taken to the refusal of the Referee to find the twenty-first Request to Find that the plaintiff's evidence cannot be construed to show more than an error of judgment on the part of those navigating the tug and tow.

VII. Exception is taken to the refusal of the Referee to find the twenty-second Request to Find that the evidence introduced by the plaintiff does not show negligence on the part of the defendant.

VIII. Exception is taken to the refusal of the Referee to find the twenty-third Request to Find that it was not negligence on the part of the captain of the "Cordts" to change or modify his course in approaching these drills, if, in his opinion and good judgment, a change was proper when it for the first time appeared that there was any danger.

IX. Exception is taken to the refusal of the Referee to find the twenty-fourth Request to Find that it was negligence on the part of the plaintiff to anchor these drills without some inquiry from
358 navigators, or men familiar with navigation, as to their proper location so as not to impede navigation unnecessarily.

X. Exception is taken to the modification of the twenty-sixth Request to find that the narrow passage at the lower end of Newburgh Bay between Storm King and Breakneck Mountains, where these drills were placed, is considered by navigators the most dangerous point in the Hudson River to navigate.

XI. Exception is taken to the refusal of the Referee to find the twenty-ninth Request to Find that no attempt was made by the plaintiff to repair the damages sustained by the collision.

XII. Exception is also taken to the refusal of the Referee to find as Matters of Law the requests to decide as follows:

1. Exception is taken to the refusal of the Referee to find the second Request to Find that the happening of a collision between this tow and the derrick was not, under the circumstances, prima facie evidence of negligence.

2. Exception is taken to the refusal of the Referee to find the third Request to Find that every presumption to be drawn from the evidence in this case is in favor of an absence of fault on the part of those navigating the tug.

3. Exception is taken to the refusal of the Referee to find the fourth Request to Find that the evidence of the navigators and those in command of the tug, as to proper navigation, is entitled to more weight than the evidence of those on the drills.

359 4. Exception is taken to the refusal of the Referee to find the sixth Request to Find that without any evidence of a competent witness showing that under the circumstances a navigator using ordinary skill and care would have done differently, there was a failure of proof to show negligence on the part of those navigating this fleet.

5. Exception is taken to the modification of the seventh Request to Find that there was no proper, sufficient, or legal evidence showing loss of profits to the plaintiff.

6. Exception is taken to the refusal of the Referee to find the

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eighth Request to Find that plaintiff's complaint should be dismissed, with costs.

AMOS VAN ETTEN,
Attorney for Defendant, Rondout, Kingston, N. Y.

360 *Judgment.*

Supreme Court, New York County.

Action No. 111.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
vs.
CORNELL STEAMBOAT COMPANY, Defendant.

This action having been referred by an order duly made and entered herein on the 17th day of December, 1909, upon the written consent of the parties hereto duly filed, to the Hon. Charles F. Brown to hear and determine the whole issues and after trial had on due notice to all the parties said referee having on the 15th day of August, 1910, duly made his report herein which was filed on August 19, 1910, in the office of the Clerk of the County of New York, stating the findings of fact herein and conclusions of law thereon and directing judgment as hereinafter stated and the plaintiff's costs having been duly adjusted at Eight hundred forty-five and 36/100 dollars,

Now, on motion of E. Crosby Kindleberger, attorney for the plaintiff, it is

Adjudged, that the said plaintiff recover of the said defendant the sum of Nine thousand twenty-nine and 86/100 ($9,029.86) dollars, awarded by the decision of the referee herein with interest thereon from August 15, 1910, to September 6, 1910, amounting to Thirty-three and 14/100 ($33.14) dollars, and Eight hundred forty-five and 36/100 ($845.36) dollars costs making
361 together Nine thousand nine hundred eight and 36/100 ($9,908.36) dollars.

Dated, New York, September 6, 1910.

WILLIAM F. SCHNEIDER, *Clerk.*

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Testimony.

Supreme Court, New York County.

Action No. III.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
vs.
CORNELL STEAMBOAT COMPANY, Defendant.

Before Hon. Charles F. Brown, Referee.

NEW YORK, *April* 9, 1910, AT 10:30 A. M.

Met before the Referee, pursuant to Notice.

Appearances:

E. Crosby Kindleberger, Attorney for Plaintiff.
Amos Van Etten and H. H. Flemming, Attorneys for Defendant.

It is Stipulated, that the oath of the Referee herein, be and the same hereby is waived.

It is Stipulated that the Referee be not limited in his charges herein to the statutory fees.

362 It is Stipulated that the services of a stenographer are necessary; that Bryan W. Tichenor be and he hereby is employed as such stenographer, that he shall furnish three copies of his minutes, one for the Referee and one for each side, at the usual and customary rate in such cases, and that the amount paid him therefor shall be taxed against the losing party as a necessary cost of this reference.

It is stipulated that the testimony taken herein not relating to the facts of any particular accident may be deemed to apply to all three actions, so far as the same is relevant.

It is stipulated that Exhibits Nos. 1, 2 and 3, Action No. 1, being three letters from the War Department, shall be deemed exhibits in this action.

That Exhibits Nos. 4, 5, 9, 10, 11 and 12, being the contracts, amendments, modifications and assignments, be deemed exhibits in this case.

That Exhibits Nos. 13, 14, 19, 20 and 21, being letters of notification concerning the obstructions, be deemed exhibits in this case.

That Exhibit 7, the Chart of the Hudson River, shall be deemed an exhibit in this case.

It is Stipulated that the following Exhibits in Action No. 2 may be deemed exhibits in this action, subject to objections already appearing in the record of said Action No. 2:—22, 23, 24, 25, 26, 27, 28, 29, 30, Defendant's D-1 and 32.

Mr. KINDLEBERGER: I offer in evidence a blue print show-
363 ing the condition of the river and the borings at the time of this accident.

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Same admitted, subject to correction, and marked Plaintiff's Exhibit No. 33.

GEORGE A. HAMMOND, sworn for plaintiff, testified:

Direct examination.

By Mr. KINDLEBERGER:

On the 30th day of October, 1908, I was the Superintendent of the Phœnix Construction Company, and on the following morning, October 31st, I visited the borings, at about 8 o'clock. The first thing I discovered was the night watchman waiting for me at the train, saying the last outfit was gone. I said, how was this, and he said they were run down again last night, at No. 21. We went out in the boat, and we found our pile driver hanging about 75 or 80 feet, I suppose, below the location of the hole, and that was all there was in sight. Everything else was gone. The evening before, on October 30th, I left the work at 5:25—that is when my train used to go. The station was right at the end of the line, so you could stand at the station and see the line, and also after you got on the train. I had been on the work that afternoon.

Q. What had been the condition before you left the work. What were the men doing?

A. Work was progressing. We were just putting a shot in, as I remember, that afternoon, and there was some sand seams in the rock. The rock between these two points is more or less shattered on top, and that lets sand in. In drilling with a diamond
364 drill, if any sand comes in the hole it will scour your tools so quickly that it is dangerous to work with them, and we have always got to shut that sand off, and another thing, the core is likely to choke the bit up. We force water down through the rocks from the top, and that washes the cuttings away and keeps it cool and washes it out. If there is any sand in the hole and the core chokes the bit off, and no water can get down there, the pressure from above and the sand will fasten your bit, and for that reason we had to shut the sand out—something we have done in the case of every hole we have put in there. We had struck the rock in this hole; we had drilled something like eight or nine feet. We struck two or three sand seams in this drilling, and shut them off. We had stopped our drilling and put in more casing, but the casing would not have been more than two or three feet more. The purpose of putting down the casing was to shut the sand out and make the hole safe for drilling. This rock we had struck, the supposition is that it was the side of the ledge running down, and it was shattered on the face of the ledge, and more or less seams running in, and the pressure from above would force the sand in. We were down at the time of the accident about 486 feet, if I remember correctly. We had 3 anchors on the casing and 6 anchors on Scow A, nine altogether. We lost 6 anchors: two 600 pound fluke anchors, one 1,000 pound fluke anchor, which were from the boat, and three 600 pound mushroom anchors, from the casing; and we lost six anchor lines—wire cables,

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¾ inch wire, 500 feet coils. With reference to the pipe lost, we used a drag line, and we found that there was a stump of
365 pipe there that we couldn't catch. We could feel it, but we couldn't fasten to it; it would roll off. We sent a diver down and he made a report to me, the same as he did on the first run down, that the pipe was bent down and stood in this shape (ind.)—up about 20 feet, I think—67 feet from the surface to the bend—and lay off in this way down the stream, bent over and laying in the mud. I didn't make any attempt to get the pipe up. I had just spent six weeks to get one up, and time was getting too short.

Q. Have you any idea what it would have cost you to have gotten that pipe us as compared with the value of it?

A. No. I think it was just about a stand-off, the value of the pipe and the cost in getting it. That pipe now I suppose is right in that same place. We haven't done any more work on hole 21 since this accident.

Q. Now what did you do in clearing up the wreck?

A. Simply after we had the diver's report, I had orders from the Phœnix Construction Company to come down, and we simply pulled what anchors we had left and come on down. I found the pile driver—the stiff leg and the first cross beam on the ways broken. That was repaired down below here, from the New York office; I don't know who did it or what it cost. Also there was some brick bats found the next day, so evidently it was a brick barge that was in collision with us.

(By Mr. VAN ETTEN:)

Q. Where were the brick bats you were talking about?

A. On the deck of our scow. I will say that the watch-
366 man reported that night that it was ebb tide and the wind was blowing so strong from the northwest that he didn't get ashore to notify me. We were always notified by phone. It was blowing hard, and the wind was blowing away from us, that I couldn't understand why they hooked on when they were to the eastward of us.

Q. As I understand it, there had been a bend on this hole 21 before this accident, hadn't there?

A. Yes, sir; as I say, if I remember correctly, it was about 67 feet below the surface of the water.

Q. I mean the bend that was caused at the time you lost a diamond, before that, on this same hole.

A. Oh, that bend causing the loss of the diamond—the thing bending it lifted the pipe a little from the bottom, and the bend was way down 483 feet, or something like that.

Q. That was on the occasion of the first accident,—No. 1?

A. Yes, sir. No, it wasn't 483 feet, it was about 477 feet, or something like that, because 483 feet was deeper than we were at that time.

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Cross-examination.

By Mr. VAN ETTEN:

I wasn't there that night; had left about 5:25 in the evening. I don't think there was very much wind at that time; there was a little breeze from the west, but nothing serious. This collision was with the westerly drill, hole 21, the same place as the first collision had been.

By Mr. KINDLEBERGER:

367 I have been an expert diamond drill man for twenty-five years.

Q. Do you know the reasonable cost of doing that sort of work in rock?

A. Of course the price of rock varies in all kinds of localities. That rock up there, a good fair price is six dollars a foot, barring accident.

Q. And that is true as to this particular location, hole 21?

A. Yes, sir; anywhere in that locality there. Of course, higher up it wouldn't cost quite so much, but deep holes $6.00 is a very liberal allowance, I think, for it.

LEOPOLD HANSEN, sworn for plaintiff, testified:

Direct examination.

By Mr. KINDLEBERGER:

I am a diver and have been between 22 and 23 years. I have worked for the Phœnix Construction Company around four years, and was with the Merritt & Chapman Company twelve years. (Competency of the witness is conceded.) In the early part of November, 1908, I went up to the Storm King plant of the Phœnix Construction Company, and I went down to examine hole No. 21 near the west shore. It was the day before I examined hole 23. I went down once at 21; there was 80 feet of water at that hole. I discovered a pipe down there—broke off or bent over. It was bent about twelve feet above the bottom and the upper end was laying down on the bottom; 80 feet about was laying on the bottom because the pipe sticks up 12 feet above the water and it was bent over about 12 feet above the bottom.

368 Q. How far were the different pipes laying in relation to each other? There were various thicknesses of pipes, were there not?

A. The pipes were inside of each other and all bent together like—not broken, but bent.

Q. Now the part that went from the bend down to the mud, was that straight up and down or was that bent too?

A. Well, that is a thing I couldn't tell you. You mean the outside pipe?

Q. The 12 foot stump.

A. That is a thing I couldn't tell you. If it was bent it couldn't

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be bent very much, because I couldn't notice it down there. After I found the conditions down there I went up and reported to Mr. Hammond. I was down there about three-quarters of an hour, just down the tide; that's about all you could work, three-quarters of an hour.

Cross-examination.

By Mr. VAN ETTEN:

I was employed regularly by this company, on day wages. They paid me $8 a day and my food and furnished the suit. I don't know the cost of those suits. In those two holes I made three dives, two in one day. I wasn't paid by the dive—by the day; was occupied there two days.

By Mr. KINDLEBERGER:

It took me some time to go up and back of course. I was only sent up there for that job, to examine the pipes.

By Mr. VAN ETTEN:

369 I went up in the morning, and I dived; stayed there at Newburgh over night and came back the next day. The Phœnix Construction Company paid my expenses.

APRIL 15TH, 1910.

Trial resumed.

It is stipulated that the following be deemed a part of the damages of the plaintiff herein without further proof as to the items, if damages be awarded in this action:

Drive-pipe lost:

10	in.	240 ft.
8	in.	312 "
6	in.	460 "
4	in.	480 "

Total		$1,363.51
1	1000-lb. fluke anchor	65.
2	600-lb. fluke anchors	78.
3	600-lb. mushroom anchors	72.
6	500-ft. anchor lines	253.

It is further Stipulated that the following expenses were incurred by the plaintiff herein; in clearing up the wreck:

Pile-driver, 4 days	$32.
Labor, launch, Supt. &c., 4 days at $22.90	91.60
Diver's expenses and wages	31.50
Tug hire	52.
Telephone	1.25

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370 It is further Stipulated that the following kinds and lengths of pipe were in the hole at the time of the accident, for which no damage is claimed, but that damages are only claimed for the lengths stated above:

10-in. 280 ft.
8-in. 404 "
6-in. 480 "
4-in. 480 "

GEORGE A. HAMMOND, recalled, testified:

Direct examination.

By Mr. KINDLEBERGER:

Q. You stated at the last hearing that your drill had reached a part of the rock where the rock wasn't solid, that sand came in. How many more feet of casing work do you estimate would have had to be done to reach the rock absolutely solid?

A. We estimated not over six feet more. 4 feet might have done it, but 6 feet probably at the outside. Regarding the damage done to the pile-driver, the shear leg was broken and the first cross-timber. I first saw that damage the morning after the wreck. That was repaired after it came down to the city; we didn't repair it. The boat came right down four or five days after we got things cleared up, and was repaired.

JOHN H. GRIFFITH, sworn for the plaintiff, testified:

Direct examination.

By Mr. KINDLEBERGER:

371 On the 30th of October, 1908, I was employed by the Phœnix Construction Company on Pile-driver No. 1, which was at boring 21, the westerly hole. There were two holes in place that night; hole 21 where I was, and No. 20, where scow B, was; she was below hole 20 and there was a red light on the casing; the pipe was sticking up in the river. On my boat we had white lights, one forward and one under the stern; they were hung about twenty feet above the deck. The night in question was a heavy nor'wester; clear night. I could see lights all around the community. There was no rain falling, but it was a wild night. My boat, the pile driver, was about a foot and a half or may be two feet above the water, and the water was washing over the decks up forward pretty good once in a while. I also could see lights over on the east shore and the other machines that night. I could see the lights on Scow A; they had a couple of lights up, one forward and one aft. The tide was running ebb. In the neighborhood of about half past eight I first saw the down tow about abreast, I should judge, off Cornwall. It was coming pretty straight down the river; you could see both lights, starboard and port—red and green lights, and also the mast or head lights. I come around on the outside of the boat to see how things was and I

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looked up and I seen the tow coming down. So I seen her up there, and I went back in around in behind and back in the boat, in the house. I was there awhile and the first thing I knew I heard her (the leading tug, John H. Cordts) blowing. I looked out and the tug was right off eastward of me, between me and No. 20, and
372 the tow appeared to be right behind me. It wasn't but a few minutes after that before either the 2d or 3rd tier was in to us. The first time I saw the tow she appeared to be heading pretty straight down the river, and when I see her last she was off abreast of me, wrapping me up pretty near; she was kind of cate-cornered like across the river, on a southeast course. The helper, J. G. Rose, was there, but I didn't see the helper until after the tow hit me, because I was standing on the east side of the machine. It was either the 1st or the 2d tier from the forward end that hit me. If I ain't mistaken, I think it was a big coal barge—the feller run from one end to the other end and was hollering, and wanted to know what business I had anchoring out there in the middle of the river. She kept butting the tow all along—every tier. There were some brick barges in the very end of the tow. They left some pieces of brick on my boat, and I thought one time they was going to take my rowboat away from me. It was kind of a hard crash, if you had been standing in the stern. My boat was holding on with one anchor line—one rope line we had out; we were knocked towards the west some, quite a little ways down the river, I guess; stretched out that line and kept butting. The pipe was gone, swept it right over. As far as I observed I don't think there were more than 5 or 6 tiers of boats. After they struck me the tug Rose come back and asked me if I was leaking or any damage. I went forward and looked and all I could see was the stiff-leg broke and a brace, but the damages was all above the water, so it didn't make her leak to amount to anything, so I had no trouble keeping her free. All the
373 other anchor lines was all broke off except the one rope line we had out forward and they drug that down the river. That might have give. All the boats hit me excepting the first tier, I think. The west side of the tow, the starboard or right side going down, hit me.

Cross-examination.

By Mr. VAN ETTEN:

Since I was about fourteen years I have been on the river steamboating and sailboating. I live at Fishkill Landing. I spoke of this as a "wild night," a heavy northwest wind was blowing, and of walking out on deck to see the water wash over; that was coming from down the river.

Q. So that in your experience from what you had seen it was a pretty hard night to navigate?

A. Quite hard.

Q. And you came out to see how things were, you say? I suppose that was because of the force of the wind and waves?

A. Yes, sir; because it being bad weather. I didn't notice a

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lighter or a steam vessel of any kind passing just before they struck me. I had been about a year and a half on that pile-driver. This occurred between half-past 8 and 9 o'clock. Nobody else was on the boat but me.

Q. This tow went in the usual place where they go, between those two drills?

A. Well, she appeared to be coming more straight down the river when I seen her up above——

Q. I mean wasn't it the usual course of tows, to go between those?

A. Yes, sir; between the two outside ones.

374 Q. Had you ever had any experience in towing up and down the river?

A. No, never. My experience was in ferry-boating at Fishkill. I was on the steamboat Harvey fourteen years.

JAMES H. ROBINSON, sworn for plaintiff, testified:

Direct examination.

By Mr. KINDLEBERGER:

I have had experience on the water somewheres around 20 or 25 years, being on sail-boats and steamboats. I worked on the old "Hasbrouck," worked on the Annie M. Tower and the Mohegan and the Albertina here in New York, holding position as deckhand. On the night of October 30, 1908, I was nightwatchman on Scow A, which was to the eastward of No. 1. I wasn't on the line of borings. I was below them, because I was knocked off the night before. I had been on Hole 23, the hole that was hit two nights before. I had two white lights up, and I seen two white lights burning on pile-driver No. 1. You could see up and down the river almost all the lights you wanted to look for; could see lights on both shores, and up the river, I suppose, near to Newburgh—could see lights up as far as I wanted to look, and down I judge around Cold Spring or West Point—could see quite a ways through there. It was a rough night, the wind blowing northwest. The tide was ebb. My boat was maybe a length or two lengths below the line of borings, but I couldn't swear to that. The boat I was on I think is 100 feet long.

375 Q. What lights, if any, were on hole 20, the one they were boring there, that was alone?

A. That is where scow B was, you mean?

Q. No. There was one boring there alone, wasn't there?

A. That was scow B to the eastward—only about 300 feet, inside of me—to the eastward. They didn't have any boat there; they had a red light there. The boat was up at the Cornwall dock.

Q. What did you notice about this accident? Did you see the tow coming down?

A. I seen the tow coming down. I should say, up around Cornwall. I didn't pay any attention to it, I went inside and set there; didn't notice which side she was going to come. After that I noticed the big tug blowing No. 1, and the tow and all of them. The

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boats and the other little tug looked to be in a heap and blowing whistles and one thing and another. I couldn't see much because I was on the east side of the tow, between five and seven hundred feet away from them.

Q. How were the barges in the tow, straight up and down the river or across the river?

A. When she was wrapped around No. 1?

Q. Yes, sir.

A. I couldn't swear. I could see lights but I couldn't distinguish the barges, what kind they were or anything else. I heard a crash and heard whistles blow on the tug. After that I went inside and set down. It was so rough I couldn't get in the small boat to go over and see what happened. That's all I know about it.

376 Cross-examination.

By Mr. VAN ETTEN:

It certainly was a rough night; so rough I wouldn't go in the small boat to see what the result was. I have never had experience on tows.

Q. You say there was a red light at hole 20?

A. That is where scow B was, I don't know the number of the hole. That was the east hole. They took her away with them and docked her at Cornwall, and the next day, the day after the accident, they shifted me on to that hole to take the pipe out.

Q. So there was a red light on the hole and on the scow besides?

A. I was down here (ind.) with white lights. The red light was east of me.

Redirect examination.

By Mr. KINDLEBERGER:

I seen the staff lights on the helper tug. She looked to me when she was up the river as if she was on the west side of the tow. I couldn't see her colored lights. I didn't take much notice to the colored lights on the main tug, Cordts. I see she was coming down the river. I was on scow A, and this hole 20 with the red light on it was east of me and a little above.

By Mr. VAN ETTEN:

I didn't see a lighter or any other boat there.

377 FRANCIS W. BELKNAP, sworn for plaintiff, testified:

Direct examination.

By Mr. KINDLEBERGER:

It is Stipulated that the testimony of this witness so far as the same is applicable shall be deemed to apply to this case. This refers to the testimony given by him in Actions Nos. 1 and 2.

Q. Mr. Belknap, you are familiar with this hole and its condition at the time of the accident?

A. Yes.

Q. And based upon your experience of conditions and your knowledge of what actually happened at the time of the accident, how many feet of casing work do you estimate would have been required to have reached the condition of rock where drilling could go on uninterruptedly?

A. Well, the casing—what we call casing—had practically reached that depth where we expected to have to shove the 2½ in. casing about 2½ feet further to shut out that sand. I am familiar with the cost of hole 21 to our company up to the time of the accident, exclusive of the damage claims of Action No. 1.

Q. Will you state what that hole had cost your company up to that time?

Mr. Van Etten: That is objected to as immaterial.

The Referee: It was admitted before; I will admit it now.

Mr. Van Etten: Exception.

A. Exclusive of the damages of Action No. 1 and exclu-
378 sive of any charge for plant, it had cost us $14,200 in round figures.

Q. How much had your company received from the City of New York for that hole up to that time?

Same objection, ruling and exception.

A. $9,705.

Q. How much, then, had your company lost on that hole up to that time?

A. We did not figure that it was a loss, we figured that it was merely postponed.

Q. Now, if your company had been permitted to have gone ahead with the drilling of this hole and had completed the same, when do — estimate the work would have been completed and how much additional would the City of New York have paid you for the work?

Mr. Van Etten: Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Exception.

A. We figured on finishing the work by the middle of December completely—that is to say hole 21, including the removal of the obstructions. And the City would have paid us $8,670 in round figures additional, that is in addition to the $9,705 already paid.

Q. Now, can you estimate from your knowledge of the conditions at that hole and from your experience how much it would have cost your company to have completed the hole?

Same objection, ruling and exception.

A. About $1,830.

379 Q. How do you arrive at that estimate?

A. We figured the five feet of casing work to be worth five days' work at $35; and then 234 feet of diamond drill work at $6.00 a foot, and $250 for removing the obstruction.

Q. Are those prices, $35 a day for casing work and $6 per foot for diamond drill work, fair and reasonable figures?

A. They are actual cost. The $35 a day includes $7 a day for the scow, but the $6 a foot for the diamond drill work does not include any scow charge. The reason for that, I might add, was that we used one kind of a scow for the casing work and one kind of a scow for the drill work, and the drill scow was a little pontoon which we purchased when we first undertook this work for $200 and we hardly thought it worth while making any charge against the work for the use of that scow.

Q. Now, what would have been your total expenditures to have completed the hole, if no accident had occurred?

A. $1,830 plus $14,200, making $16,030.

Q. How much would you have received from the City for the total hole?

A. The sum of $9,705 plus $8,670, or a total of $18,375.

Q. That is, the contract calls for that hole a depth of how many feet?

A. 725 feet.

Q. And it is already in evidence what the rates of compensation were?

A. The prices are in the contract.

Q. Then if this accident had not occurred you would have
380 recovered the $4,500 which you had spent over what you had received and a profit of about $2,300, is that right?

A. Yes; that's right.

Q. Now, you make a charge here for repair to the pile driver No. 1, a new stiff-leg and cross-brace, and your item is $150. Is that a fair and reasonable amount for that repair?

A. We took the charge just as turned in by our Superintendent for that work. It is a fair and reasonable charge. The stiff-leg is the side-brace on the side of the ways, and it has to be rather a nice stick.

Q. Did your company ever do anything more on hole 21 after this accident besides cleaning up the wreck?

A. We had a consultation in regard to the feasibility of recovering the hole. There was no further labor or money expended.

Q. Was there any hole put down anywhere near hole 21, irrespective of hole 24, which was 20 feet from 23?

A. There have been no new holes since 24; 24 is the only one, and I think that was 500 feet away from boring No. 21.

Cross-examination.

By Mr. FLEMMING:

Q. At the time of this accident you say that you had received $9,705 from the City?

A. Well, I mean that we had earned $9,705, and subsequently received it, and that is all we received from the City on this hole.

Q. And up to the time of the accident this hole cost you, according to your figures, $4,495 more than your contract price?
381 A. Yes.

Q. Why was there an increased cost here whereas on hole

23 the amount received exceeded the cost at the time of the accident?

A. The real reason was that in hole 23 we were down deeper, and each foot that we went down we recovered a portion of the part that they had taken off the top. And the second reason was that No. 23 was a much more prosperous hole than 21. It went more easily straight through, there were less obstructions. The items of cost to the time of the accident are actual expenses taken from our ledger.

Q. On the same basis as the items of cost for 23?

A. Not on the same basis. They are bills paid.

Q. Are they the same items, that is are they the same class of work as you did on 23 to the time of the accident?

A. They are for pipe and they are for labor and for coal and towing and material.

Q. Have you included in the $14,200 any item for cost of plant?

A. No, no cost of plant.

Q. So your profit on this hole would have been but $2,345 if you had completed it?

A. Twenty-three hundred and some odd dollars, as we estimated it.

Q. Did they get such information from this hole 21 as they required?

A. Not absolutely. You see they want the core down to that depth to which the hole was contracted for—725 feet, so as to
382 let the geologists and experts examine it and decide what class of material the tunnel would go through.

Q. How is it you did not receive an additional hole after losing 21 to get the same information you were after here?

A. I testified to that, I think, in the last case. It arose from various reasons. In the first place, you know the head of the water board changed during the time this contract was in force. The chief engineer was very anxious for additional holes and recommended a contract for four, for the season of 1909, and then a new chief of the water board—new president of the commission—was against letting a contract for more than one center hole, that's all he wanted.

Q. Was there anyone aside from the employees of your company called in to the consultation as to whether or not it was advisable to continue hole 21?

A. Mr. Swift, the man under whose direct supervision we were working.

Q. No outside party other than Mr. Swift was consulted with reference to the advisability of continuing this hole 21?

A. Not the advisability—the practicability; whether it was possible to continue it. We decided that with Mr. Swift.

Q. And largely based upon the report received from your diver?

A. The report received from the diver in conjunction with the fact that in September an additional bend in the pipe below the mud line had been discovered through the loss of the diamond for

which we billed you, in Action No. 1. The loss of that dia-
383 mond showed what we did not at first suspect, that a bend had taken place in the pipe, or the pipe had been bent, in the first collision, below the mud line, and it was the opinion of Mr. Hammond, Swift and myself that a second accident could not fail to add to that bend, and therefore make the hole impossible to proceed with.

Q. So that your conclusion not to proceed was based, to a certain extent, upon the fact that there had been a previous accident which had caused a bend in this pipe?

A. That together with the closed condition of the stump of the pipe.

Q. And this bend which you refer to you did not discover until after you had resumed work subsequent to the first accident?

A. No. It was only a slight bend. It was not sufficient to stop the putting of the drill rods through the hole, but merely sufficient to cause the edge of the diamond drill to rub against the side of the pipe when withdrawn and pull out one of the diamonds.

Q. And you were all of the opinion that the second accident had, by reason of the fact that there was a bend there, increased that bend to such an extent that you did not deem it advisable to proceed with the work?

A. We figured that it was impracticable.

Redirect examination.

By Mr. KINDLEBERGER:

Q. What effect had the closed condition of that pipe on the practicability of your going ahead with the work?

A. It meant that the recovery of the hole would take four
384 or five months and considerable expenditure of money. We argued with Mr. Swift that there was nothing in our contract that would call upon us to proceed with that hole under our present rate of compensation, and that if he desired anything more done to it we would be very glad to take the order on a forced account basis, but we never got the order.

Q. I mean what effect on the physical ability to go into that hole would the closed condition of the pipe have?

A. It would not have any more effect after this accident than it did in No. 1, providing we had the same good fortune in pulling the pipe. You see the whole question whether the pipe—when that big derrick of Merritt & Chapman got hold of that pipe, the object in doing that was to pull off the deformed and mashed sections, just breaking the thread of the coupling and leaving the perfect pipe standing above the mud line down below. And the success of that whole thing depended on that pipe breaking above the mud line. In July, fortunately it did. If we had put the same derrick on the same pipe again in October, and it had broken as successfully as it did in July or August, the hole could have been continued, providing the bend which I spoke of did not exist.

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Recross-examination.

By Mr. FLEMMING:

Q. The refusal of the City of New York, through Mr. Swift, to assume the cost of recovering that hole determined the ques-
385 tion as to whether or not there should be a resumption of work there so far as your company was concerned?

A. Why, we would undoubtedly have taken any order for additional work there that they gave us, to do anything whatsoever, on a percentage basis.

Q. And had they assumed the cost of recovering the hole, you would have proceeded at No. 21?

A. We would have proceeded, but we would not have guaranteed recovery.

Mr. KINDLEBERGER: The plaintiff rests.

Mr. VAN ETTEN: I desire to raise the question that the plaintiff has not made out a case.

The REFEREE: You may raise that finally at the close of all the testimony.

Mr. KINDLEBERGER: I move to amend the Complaint in this case as to the amount of damages; they are a little bit smaller than the proof shows. I therefore move to amend to conform to the proof, and instead of alleging damages at $7,762.85, make them $9,023.66.

Motion granted.

JAMES ELMENDORF, sworn for defendant, testified:

Direct examination.

By Mr. VAN ETTEN:

I live at Rondout, and I do steamboating on the Hudson River and Harbor of New York, holding a master's license; have navi-
gated the Hudson River about 30 years, on sail and steam
386 vessels, and have been engaged in towing about twenty-five years. On October 30, 1908, I was captain of the steamer John H. Cordts. She is 130 feet over all, about 28 feet wide, with a tonnage of 194 gross; 97 net. On the night in question I had the tow coming down the river, consisting of brick barges, ice, crushed stone, 11 boats in all. For my boat 20 boats would be an ordinary tow. Coming down it was quite a rough night. The wind blew very hard from the westward; it was quite dark—a little misty on the water. I heard it described here as a "wild night"; that's what I would call it, quite wild, the wind blew hard. I had the tug J. G. Rose with me as a helper. I had been navigating through those drills ever since they had been there, about three times a week.

Q. When you came down that night, Captain, how was your course and where was your tow in the river?

A. Our tow was well out into the river from the west shore. We come down the usual course to clear those drills.

Q. Now before any of the drills were there what was the ordinary

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and usual course on the down tow?

A. The course was about where the west drill lay. That is our usual course down through there, the way the tide sets. The tide that night was ebb, and a westerly wind. The wind affects the tide somewhat.

Q. And did you make allowances for that as you came down?

A. Yes, sir; we was making all allowance for them.

387 Q. And in order to do that state the course as near as you can——

A. Just to the westward of the drills?

Q. You came to the west of the drill?

A. No; to the eastward of the west drill. That is our course to come down to clear the east drill. We anticipate the tide and wind will carry the two over towards the eastward, and we made allowance for that that night.

Q. Now as you got down near the drills was there any other vessel there?

A. There was a steam lighter come down on our port side very closely, and I couldn't get any further to the eastward he was so close to us. I hollered to him that if he didn't get out of the way I would have to sink him,—pull the hawsers on top of him and sink him. So he come down to the eastward of us and crossed our bow within about 200 feet of the west drill. He went right to the westward. But for that we would have been further to the eastward. Then we hauled right to the eastward to clear the west drill; we was getting quite close to it then. This lighter went about five feet from us on our port side; she was going faster than we were, and as soon as he did pass us he cut in between us and the drill and went westerly of the west drill. As soon as he gave us clear water we turned to the eastward, and we passed this westerly drill about 100 feet off; it might have been the length of the steamboat.

Q. Now Captain, what effect, if any, would you say turning to the east, after this lighter had got out of your way, what effect would that have on your tow?

388 A. It would swing or curl our tow a little to the westward.

Q. And for how long a distance as you were coming down did this lighter keep on your——

A. We first saw him, oh, all of a thousand feet back, and then he kept bearing right down on the tow. I didn't have any notion that he was going to cross our bow, I thought he would keep off clear of us. As I say, we cleared the westerly drill by 100 feet.

Q. Now, did your tow, or are you able to tell whether your tow collided with any part of the drill?

A. We heard something hit, but I couldn't tell what part it was. I knew the tow collided somewhere with the drill. The Rose went off from the port side of the tow to the starboard side, when we was quite close to the drill, but I couldn't tell you just how far. I don't know what she did.

Q. Was there anything else, in your opinion as a navigator, that you could have done there to have escaped these drills?

A. No, sir; I don't think I could.

COPY BOUND

Q. What do you say as to the difficulties of navigation with these drills in the river there?

A. It was about as difficult a place as you could put them in in the river, and as close together as they was, for steamboats and tows to clear. There hadn't no tow went through there but what had one or two tugs on to it to clear it. It was almost impossible to clear it.

Q. What do you say as to the possibilities of going westerly of this drill on ebb tide?

A. I would never try it. I don't think it safe to go to the west of it.

389 Q. And what do you say as to going to the eastward of the other drill?

A. You go to the eastward and you will surely strike the mud, because your tow will swing off harder yet because the tide sweeps off there from Cornwall and will send you clear on the flats, and Little Stony Point is right below it, and your tow won't clear it.

Q. As a navigator what you say was the safest or practically the only safe way to go in between the drills on ebb tide?

A. Yes, sir, that is the safest way to come down with a tow.

Q. Now, did you at any time have a mind to go to the westward that night as you came down?

A. No, sir. I directed my course from the start to go through between those drills.

Cross-examination.

By Mr. KINDLEBERGER:

The barges were made up in the tow one after another two abreast, making five tiers; there was an odd boat on the port side of the tow, next to the second last tier, and not the same size barge as the others; she was a small boat about 16 feet across, I suppose, and about 90 feet long. The 11 boats were loaded.

Q. Now, you knew it was blowing pretty hard when you got off Cornwall, didn't you?

A. It blew hard all the way down the river. Away above Newburgh it blew hard.

Q. Don't you know, Captain, when it blows hard, you want to take a little more care?

A. We used all the care that we could use.

390 Q. You cut down your tows, don't you, in heavy weather?

A. No. This was a very small tow. Never since I was steamboating have I, in heavy weather, cut our tows down. If it was blowing a gale I wouldn't take 20 boats along as fast, but I would navigate them whether it is blowing hard or light. I never have stopped for wind yet; possibly I may.

Q. It is more dangerous if there is a heavy wind blowing?

A. Yes; it is according to how the tide is. If you have an ebb tide going down and a northwest wind, that doesn't hurt the steamboat and tow.

Q. Well, now, when you got down to Cornwall, just how did you head as regards the west drill—straight for it?

CLOSE IN CENTER

A. No, a little to the eastward of it.

Q. And you kept your course?

A. No, I sheered off a good deal more before I got to it, to the eastward; I began to sheer about 300 feet north of it. Sagged over towards the steam lighter that was coming down.

Q. You knew when you sheered your tow would swing to the westward, didn't you?

A. No; you can't tell that.

Q. Don't you know that when your tug goes to the east the natural tendency will be to throw your tow to the west?

A. Not much; it will a little bit. But in 200 feet it will recover itself and sheer off again.

Q. Now when did this lighter pass you?

A. It passed us about 200 feet right above the drills, or may be a little bit more. I couldn't tell you how much speed she was
391 making; probably one-third more speed than we were making. She was alone and loaded. We didn't get her name and never could find out. She passed about five feet away from us.

Q. Why didn't you blow to the lighter?

A. She was so close on to me that I hollered and told him to get out of the way or I would pull the hawsers over on top of him.

Q. But why not blow when you saw him coming?

A. He was too close on to us—do you mean when I first saw him?

A. Yes.

A. I didn't think she would come near me.

Q. But when you did see her coming near to you why didn't you blow then?

A. It wasn't necessary.

Q. Don't you know if you had blown to her and she answered, you never would have been anywhere near her?

A. She wouldn't have cleared us any different. We blow when it is necessary.

Q. Now, you say when your tug was about 300 feet above these drills you had your course to the eastward of that west drill?

A. Yes, sir. So I would clear the drill all right.

Q. Now, you say when you went down a little bit further you saw that your tow might not clear and you went still further to the east?

A. No; that lighter was so close we couldn't get further to the eastward or we would have been further to the eastward. When I hollered to him he commenced to sheer right on us and then he sheered off westward to go to the westward of the west drill,
392 and then we sheered harder to the eastward yet.

Q. Now, Captain, if about 800 feet above the drills you had gone a little more to the eastward wouldn't you have cleared that drill all right?

A. No, sir; I think my course was directed just as straight to go clear of them drills as could be.

Q. Now, you say you set your course to clear the drills. What do you mean? How far away was your tug from the west drill when you went by?

A. I say about 100 feet or a little more.

COPY BOUND

Q. Wasn't the tide and wind helping you to clear? The tide sets to the eastward there, doesn't it?

A. Yes, sir; the tide sets to the eastward. That was what we was allowing for.

Q. But as a matter of fact you did not allow quite enough?

A. Yes, we did allow enough. We allowed enough for the tug.

Q. But you did not allow enough for the tow to clear?

A. Yes; we went in closer to the drill than that to clear the tow—closer than 100 feet.

Q. But you thought the west wind and tide would swing your tow over, didn't you?

A. Yes, sir.

Q. And it did not swing it quite as far as you thought it would, isn't that so?

A. Not quite as far as we thought. You see that is quite a difficult place there.

393 Q. Now, when you got past the drill and when you got clear of this lighter you put your tug still further to the east, didn't you?

A. Yes, sir; we sheered a little bit more to the eastward.

Q. And that had a tendency to swing your tow to the west again?

A. No; it wouldn't swing much, not with the tide and wind against it. You can't swing on ebb tide.

Q. It did swing some, didn't it?

A. I don't think it did. It might have varied a little bit, but not to amount to anything.

Q. Why did you sheer your boat to the eastward to get by?

A. Always did that, to keep straight down through there.

Q. Did you give any instructions to the helper tug to help you through that place?

A. No; they all have instructions from the office to help every tow through there. The tug Rose went from the port side to the starboard side of the tow when we were about 200 feet above the drills.

Q. If the tug Rose had been on the starboard side from Cornwall down wouldn't you have gone through all right?

A. That I don't know.

Q. Don't you know now as a navigator that you would have gone through all right, if the helper tug had been there to keep the tow from swinging?

A. No, I don't, nor you nor any other man don't know it that steers tows up and down the river there.

394 Q. Now, as a navigator, how do you account for the fact that when you were going to clear this westerly drill on the starboard side you kept your helper tug on the port side until you got almost on it?

A. We thought we would clear the drill all right, until this lighter come right down on top of us, then I see when we got clear of the lighter—then I sheered to the eastward more yet.

Q. Now, you know after they took out that center hole No. 23, there was about 800 feet between the two drills, don't you?

A. Yes, sir.

D CLOSE IN CENTER

Q. That is a pretty wide channel?
A. Plenty of room, plenty of room there now.
Q. Now, if you had cleared that westerly drill, say, instead of 100 feet if you had cleared that with your tug 200 feet, you wouldn't have hit anything, would you?
A. I don't know. It is hard for me to tell or for you to tell.
Q. Well, you have often gone past there 200 feet away, haven't you?
A. Yes, we have often gone past there 200 feet.
Q. Now if you had gone along there about 200 feet, there wasn't any chance of the tide and wind conditions that existed then of your tow being shoved over to the west, was there?
A. No, I don't think so.
Q. Because the constant tendency was to shove your tow over to the east, wasn't it?
A. Yes, sir.
Q. So if you had cleared that westerly drill by 200 feet to the east you probably would have gone through all right?
395 A. I have no doubt but what it would.

By Mr. VAN ETTEN:

Q. You knew a night or two before a tow had collided with that middle drill, didn't you?
A. A tow had, yes, sir, and I had that in mind in making my point to clear it that night.

By Mr. KINDLEBERGER:

Q. You knew the middle drill that had been collided with a couple of nights before had been taken away, didn't you?
A. No, I didn't.
Q. Well, you didn't see any lights there, did you?
A. The night before? No.
Q. Two nights before?
A. No.
Q. You heard about the accident?
A. We didn't hear about it until we got in New York and then I heard about it.
Q. Well, you didn't see that middle drill there that night?
A. Well, sometimes we didn't see no lights at all.
Q. But this particular night you saw the light on the west drill?
A. Yes, sir.
Q. And the light on the other one?
A. Yes, sir.
Q. The red light?
A. No, we didn't see a red light, we see a white light on the east drill and a white light on the west drill.
396 Q. You didn't see any light on that middle drill?
A. Yes, sir.
Q. Not that night?
A. Yes, sir.
Q. There wasn't any middle drill there, was there?

COPY BOUN

A. Yes, there was.
Q. How many drill- do you say there were?
A. Three.
Q. That night?
A. I supposed there was. I didn't know what was to the eastward of the east drill—that is the drill that was to the east of that one—what was to the eastward of that, I don't know. We can't look all over the river. We have to look where we go.
Q. Lights were perfectly visible that night?
A. Oh, yes; we could see lights.

IRA HYDE, sworn for defendant, testified:

Direct examination.

By Mr. VAN ETTEN:

I live at South Randolph. I hold a pilot's license. Have been navigating the Hudson River for twenty-five years in sail boats, steamboating, barges. This is the third season I have been in the towing business. On the night of this accident I was mate on the tug Cordts and as we came down the river near these drills I was in the pilot house sitting in a chair, looking down the river. To look well down you have to stand up. I could see out of the port side of the pilot house door. As we got down near those drills I saw
397 a lighter close to us, close enough that I thought she was going to hit, and I got out of the pilot house and went downstairs to pull up the iron that we hang over the sides, where we blow out the ashes. We have an iron which laps a plank sheer like that (ind.) and we let that go down and that keeps the ashes from coming up in the air; that extends out on the side of our boat all of three feet, I think, and I went down because I thought this lighter was coming near enough to us to collide with that iron. It is only hung there and the least jar overboard it goes. The lighter was going in the same direction we were, and came pretty close to us. She came down and followed right across our bow to the westward.

Q. How far do you say she was from the drills when she crossed your bow?
A. We was getting along down that way, probably a couple of hundred feet or so.
Q. And do you say that that boat interfered with the navigation of your vessel?
A. Well, we could have hauled to the eastward further if she hadn't been right on top of us. After she did pass we hauled to the eastward right away. After going down and adjusting this pipe I didn't go back in the pilot house right away, I stood forward a few minutes—I think I got a drink of water too before I went up. I was downstairs forward on the deck when we came to the drill. I agree with the other witnesses that it was a wild night; there was a good stiff breeze of wind down the river. The tide was ebb. I think our boat went a couple of hundred feet from the west drill in passing it.

CLOSE IN CENTER

398 Q. Did you anticipate then there would be any trouble with your tow passing it?

A. That I didn't know.

Q. Well, prior to that, had your tow been in pretty good line behind you as far as you could see?

A. As far as I thought up to the time the steam canaler was right against us, and then we had to haul back to the eastward again in order to clear that west drill. I have had experience with a sail boat on the Hudson, and other vessels. I had gone through there while these drills were there frequently on tugs.

Q. What do you say as to the difficulties of navigating there?

A. You wanted all the room there was there.

Q. Well, was it a difficult place to navigate?

A. Yes, sir; quite a difficult place; particularly so with the wind blowing, that would increase the dangers.

Cross-examination.

By Mr. KINDLEBERGER:

I think they call the hawser from the tug to the barges 100 fathoms, I am not sure. We had out the usual length. We don't shorten our hawser if it blows hard, and I never have seen other boats shorten them, when it blows hard.

Q. Now Captain, you didn't change the course of the tug on account of this lighter at all, did you?

A. Well, I wasn't up there at the time I went to pull up the iron, and I couldn't tell you what he was doing with the wheel.

399 Q. So far as you could see, they didn't shift the course?

A. Couldn't shift with this steam canaler there across our bow, but when he cleared.

Q. So you were going the same course before this boat came down until after she got by and then you shifted?

A. We was going the course we always went till this steam canaler come behind us and we couldn't haul to the eastward on account of her. It was right up against us. If it hadn't been there we would have went down there like we always have, clear of everything.

Q. Now after she did get clear that was about 300 feet above the drill, wasn't it?

A. About that distance, I guess.

Q. How many points did your tug sheer off to the eastward?

A. I wasn't steering and I couldn't tell you what sheer was done.

Q. You saw it was not going straight as she had been before, didn't you?

A. We was going down as straight as we could after we got clear of the steam canaler.

Q. Then you say you shifted your course to the eastward?

A. Hauled her eastward some to clear the west drill. I couldn't tell how many points she was hauled off when another man was at the wheel. I couldn't see him turning the wheel from on deck; and didn't notice whether the tug changed her course after he did haul her off.

Q. Did you see what the barges were doing after he started to go off towards the eastward?

A. I wasn't noticing particularly.

400 Q. Didn't it swing his scows off to the west on to the west drill?

A. Well, I don't know how it could swing them. I wasn't watching back there at all. Take a dark night and quite a string of boats, you can't see what is going on back there.

Q. You know as a navigator if you give your tug a swing to the east it is apt to swing your barges to the west?

A. According to what she may have to swing.

Q. You know that is a usual thing to happen, don't you?

A. If you pull to the eastward after you get your hawser tier the rest will come with you?

Q. But it would put the hind scows to the west, wouldn't it?

A. It might and it might not. I could see the lights on the scows in our tow. I didn't see them swinging over to the west. I didn't see much of what happened when I was sitting down in the pilot house. T/he first thing I saw was when the steam canaler was right alongside of us, and I went down to pull up this iron. Before that I didn't notice much what had been going on. The captain had the wheel when I was sitting down. One of the deckhands was downstairs. I don't remember whether or not I saw him when I went down; went down pretty quick to pull the iron up and don't know whether or not I saw anybody.

Q. You won't say there was anybody; any lookout on the forward deck, will you?

Mr. VAN ETTEN: I don't know that there is any allegation of any lookout on deck, do you?

401 The REFEREE: The accident was not due to any lack of the lookout, was it?

Mr. KINDLEBERGER: I think it might have contributed to some slight extent.

The REFEREE: The Captain saw everything there was.

BENJAMIN HENDERER, sworn for defendant, testified:

Direct examination.

By Mr. VAN ETTEN:

I was engineer of the Cordts on the night of this collision. It was considered an unusually rough night on the river. I was in the engine room on watch, and it was so rough I had to close my engine room up; the weather was cool that night. The size of the Cordts' cylinders is 27-53-40; 40 inch stroke. She develops over 1,400 horse power, and is considered a powerful tug for the tonnage. 194 gross tons, I believe, is the tonnage. A boat of that power could handle a tow of 11 boats very readily. I only know about this collision from hearsay.

402 APRIL 29TH, 1910.

Trial resumed.

GEORGE W. TAYLOR, sworn for defendant, testified:

Direct examination.

By Mr. FLEMMING:

I am master of the steamer Saratoga, and have been three years this year. I have had experience in steamboating since 1885 when I got my first license as master. For twenty odd years I have done towing between Troy and New York City.

Q. You had knowledge of the fact that during the season of 1908 there were drills anchored between Breakneck and Storm King Mountain?

A. There were, yes, sir. I had passed up and down at various times while they were there. In going down on ebb tide I generally went between the west drill and the second one. We have gone to the eastward of the second drill on account of meeting an up tow, but when we did not meet an up tow our regular course was between the west drill and the second drill from the west shore.

Q. From your experience in the tow business and your experience with the drills passing up and down between Storm King and Breakneck what do you say with reference to the difficulties of navigating at that point?

A. I will state that a man is always running a risk in order to take a tow between those two drills. It is a risky business from the time he started to enter the drills until he gets past the drills, more especially when he happened to meet some up boats.

403 Q. Did you personally ever have any trouble there with your steamer?

A. No, but on several occasions we had to back, and I have caused the whistle to be blown in foggy weather so as to get an answer from those drills so I could locate them. On one occasion I heard a man, as we were going by—he hollered and wanted to know what in hell made me blow my whistle, and I told him it was to get an answer so we would know where they was. We were going up at that time, but we couldn't see him.

Q. Do you recall the fact that the east drill so-called was removed during the latter part of the season of 1908?

A. Well, at times they were close together and at other times they were quite a distance apart.

Q. But irrespective of the distance you had to the eastward was your course regularly between the west drill and the second drill in going down on ebb tide at night?

A. Well, we always change our course about a quarter of a point in order to clear the second drill. We went between the west drill and the second drill from the west shore.

Q. And that was irrespective of the fact that you had more space to the eastward? Did that make any difference to you? The fact that there was more space to the eastward, on the east shore?

A. I wouldn't say as to that.
Q. You never went down on the east shore at night on ebb tide?
A. Never went down there at all, unless I drifted off there
404 in the fog and couldn't tell how far we were apart.

Cross-examination.

By Mr. KINDLEBERGER:

Q. Now, you remember the conditions when there were only two drills in the river?
A. What do you mean, conditions?
Q. Towards the end of October, 1908 you remember there were only two drills in the river?
A. I remember there being two there, but in what part of the year I couldn't say.
Q. You remember one time there were four and another time three and then they got them down to two?
A. I believe there was.
Q. You didn't have much trouble in going through with two there?
A. Yes, sir; we had the same trouble with two as with the others.
Q. That is in foggy weather, you mean?
A. No, when there was a tow coming down. I have always tried to avoid meeting a tow in there, to give the tow captain all lee-way possible, so he could get down through there without any damage.
Q. But when there was no tow there you had no trouble, I mean when there were two drills there?
A. No more than we had to change our course from a quarter to half a point from Little Stony Point to Polopel Island.
Q. Which way did you change your course?
A. To the westward.

405 (By the REFEREE:)

Q. When you were going down?
A. No, sir; going up.
Q. Going down I am speaking about. You say you changed your course a quarter of a point?
A. We changed from a quarter to a half going up.
Q. Going down I am speaking about.
A. Didn't change that much going down, no. We generally went down pretty straight.
Q. You went nearer the second drill than the west drill, didn't you, in going down?
A. Well, that is a matter of taste with the pilot. I couldn't say as to that.
Q. Well, there was a big wide space through there when there were only two drills there?
A. At times there was, and other times no.
Q. I am speaking about the time when there were just two drills there. That is what you are talking about, is it?
A. I am talking about the two, yes, sir.

Q. You said that you changed your course in order to clear the second drill; so your course was usually towards the second drill?

A. No, the course was usually towards the west drill. We changed our course in order to clear the second drill. The way we generally go up the river——

Q. But I am talking about going down the river?

A. It would be the opposite, then.

Q. Now, when coming down the river, you said that you changed your course a quarter of a point to clear the second drill?

406 A. No, we changed it going up the river. I am talking about up the river all the time.

Q. Now let's talk about coming down the river.

A. As I stated, it is a matter of taste for the pilot. We generally run straight down in order to get on the starboard side or right side of the river. It is customary and we keep closer to the right hand or starboard drill—the one nearest to the westward.

Q. When do you change your course before you get to the drill going down?

A. If we are over far enough from Polopel's Island, we don't change our course, we take a straight course. If we hook Polopel's Island we change our course just before we get to the drill in order to keep a straight course.

Q. So the drills did not bother you in your course down the river, did they?

A. That depended how it happened. If we didn't meet a tow they wouldn't bother us, but if we did meet a tow it would.

Redirect examination.

By Mr. FLEMMING:

Q. Prior to the time the drills were there what would be your course down the river and about where would you pass Breakneck Mountain?

A. Well, our course would be almost right in track of the first drill—the west drill.

Q. About over the place where the west drill lay?

A. Yes, sir; between there and the shore.

407 GEORGE H. KELLAR, sworn for defendant, testified:

Direct examination.

By Mr. FLEMMING:

I am captain of the steamboat C. W. Morse, and have been for four years. Previous to that I was pilot on her for two years, and pilot on the Deane Richmond for five or six years. I was in the tow boat business nine years, and in the Haviland tow boat business around the harbor and bay of New York; my experience in that business being around New York Harbor here and through to Albany. During the season of 1908 I passed Storm King, and recall the drills that were placed there; sometimes there were two drills there and I guess at times there were four drills. Coming down there on ebb tide at

night we usually went to the eastward of the first drill—the westward drill, so we had a drill to the westward of us, our course being between the west drill and the second drill out from the west shore. Prior to the time the drills were placed there we usually ran a little further to the westward.

Q. From your experience, Captain, in the tow boat business and in the steamboat business generally, what do you say with reference to navigating between Breakneck and Storm King with those drills in the river?

A. I think it is a dangerous place. The location of the drills and the set of the tide at that particular point creates a dangerous situation.

Q. Did you ever have any difficulty there in navigating your steamer?

A. I had trouble there different times with tows coming
408 down, and I stopped and waited until the tows got through, so as not to go through while those tows were coming down. I told both of my boys not to bother tows there between the drills, but to stop, that time wasn't worth anything to us.

Q. After the drill to the extreme east had been removed and there were but two drills in the river, did that make any difference in your course of going down on ebb tide?

A. Yes, sir; had to pull away out of the way.

Q. I say, did you change your course after?

A. No, sir.

Q. You still continued down in the same course?

A. Yes, sir; right down in the same place. It is a roundabout way to go away over there. There isn't any difficulty encountered in going over there with a passenger boat, but there would be with a tow.

Cross-examination.

By Mr. KINDLEBERGER:

Q. You never had any trouble, did you, going through there with your boat?

A. In a fog once I had trouble. I came down there and I kept the fellow ringing his bell all the while. I got drifting down there on an ebb tide and I got down onto her and the bell didn't sound, and I was out by the flag staff myself and as soon as we got pretty close to him I told the pilot to back her strong, and he backed her strong, and the fellow commenced to holler like a loon, and of course we were carrying passengers, and politely speaking I asked
409 him what in hell he was hollering at. We were close enough to him to slide onto him. Of course I was anxious for him to keep his mouth shut so he wouldn't wake up everybody on the boat.

Q. That was a foggy time, wasn't it?

A. Yes, sir.

Q. But you never had any trouble when you could see the lights?

A. Never had trouble with lights.

Q. If you could see the lights a mile or so away, you never had trouble did you?

A. Not with our boat.

Q. You knew the set of the tide there?

A. Yes, sir.

Q. And you made proper calculations?

A. Well, we can go across the tide when a tow can't. It is an entirely different thing.

Q. And you could make calculations for it to keep out of trouble?

A. With a passenger boat, yes, sir.

GEORGE E. PALMATEER, sworn for defendant, testified:

Direct examination.

By Mr. VAN ETTEN:

I live at Athens, New York. Am a steamboat pilot, and have been about twenty years, employed continually on the Hudson River during that period. In the capacity of fleet towing I assisted mostly, but as a rule I am familiar with fleet towing on the river. On October 30, 1908, I was captain of the steam tug J. G. Rose, and was with the Cordts as a helper that night coming down, and I remem-
410 ber the tow at that time colliding with these drills. The tide was the strength of the ebb. The wind was about in the west, and a pretty good strong wind—fresh. When you get to the lower end of Newburgh Bay the tide sets to the eastward as you enter the Highlands, and on this occasion we had the set of the tide and the wind both to carry us eastward. As our fleet came down towards these drills I was on the port side of the tow. I had heard that a night or two before that night there had been a collision with this center drill. I was on the port side of the tow, and as we approached the drills I shifted around to the starboard side; that is, I shifted from the east to the west side, as we were approaching the drills. I saw a steam canal boat there that night, it passed down on our port side. I couldn't say how close she went to the Cordts, but it passed to the westward of the westerly drill, across the bow of the Cordts. I couldn't tell how far the Cordts was above the drill when I made the shift; she hadn't reached the drill yet. I was making the shift just about the same time as the canaler passed. As to how close the canaler went to me I don't suppose she was over 150 feet—not over 200 feet anyway at the outside, probably not that. I was located near the tail of the tow. I stayed on the starboard side after shifting till I saw that we had to get out to keep the drill from hitting us. The head of the tow had collided with the drill when we let go.

Q. Did you as you approached use any force to push the tail of the tow over towards the eastward?

A. Yes, sir, under full speed of the engine—what we call
411 under a hook-up bell. The water that night wasn't what you might call rough there. It never is very rough there exactly, that is close under the hills. Of course, it is quite choppy, but not a great roller on. It wasn't so rough but what it was safe enough to be out there with most anything. It was a dark night.

Cross-examination.

By Mr. KINDLEBERGER:

I couldn't tell you the name of this canaler. I wouldn't say I had never seen it before, and don't know whether I have seen it since; don't know what line she belongs to. She was an ordinary canal boat with steam into her, I guess about 112 feet long, something in that neighborhood. She had an engine back at the stern, stored in her, and she had two derricks on her. I said she was a canal boat; for all that, it might be a lighter in some respects, but not what we term a lighter.

Q. How far above the borings did you shift around to the starboard side?

A. I couldn't tell you, but within quite some distance, it being dark, I couldn't tell you how far the Cordts was from it——

Q. No, I don't mean that. How far were you from the borings, I mean, when you shifted around to the starboard side of the tow?

A. That I would not attempt to say. I don't think we was half a mile above. I didn't shift on account of any signal from the Cordts; just did it on my own volition.

Q. Now, captain, if you had shifted around there a couple of minutes earlier, don't you know this collision never would have happened?

A. No, sir; I do not.

412 Q. Well, the wind and the tide were both helping take the tow to the east weren't they at that point?

A. It would, naturally, yes, sir.

Q. So if you had helped push them to the east they would have had a tendency to go to the east and clear it?

A. If we had shoved of course it would have had a tendency to shove them to the east.

Q. But until you got pretty near the borings you were over on the east side yourself?

A. On the east side of the tow, yes. I wasn't working our engines; lying absolutely still.

Q. But the tendency of your being there to the east was to keep the tow from going to the east, wasn't it?

A. I shouldn't think so.

Q. Wouldn't it be like the action of a rudder there, shoving the tow more to the west, you being on the east side?

A. No, sir.

Q. Why is that?

A. It is because they are so much heavier than we are that we would have no effect on the tow, laying against it. My boat is 75 feet over all. I don't know what her horse power is, but her draft is about eight feet. We work different drafts, from 7 feet up to 8½ feet.

Q. Well, now, you don't mean to say that a boat 75 feet long on the east side of a tow, drawing 8½ feet of water, wouldn't have a tendency to keep the tow over towards the westward?

A. I answered that question once.

Q. It would have no effect whatever or wouldn't have much effect, which?

413 A. I said I considered it would have no effect whatever.

Q. Captain, when you got around to the starboard side and started your engines going, where was the Cordts then?

A. She was just about to the drill, I imagine. I should think she was just about in the drill; she might have been a trifle beyond and she might not. I wouldn't attempt to say how near the drill the Cordts was when she passed, because we going around the tail of the tow shut off the view.

Q. You saw that the tow was swinging at that time, didn't you?

A. No, I didn't see the tow swinging.

Q. Why did you start to push it over then?

A. I started to push it over because I see it wasn't swinging.

Q. Wasn't the tail end of the tow more to the westward than the front part of the tow?

A. Certainly, naturally.

Q. Well, then the tow wasn't straight up and down, it was swinging towards the west, wasn't it?

A. Why, no. They pull out from the west to come down through there.

Q. The tow wasn't straight up and down the river, was it?

A. No; it can't be in rounding a point.

Q. The tail end of the tow was considerably further to the west than the front of the tow?

A. Not considerably; it was following nearly straight.

Q. Which was it, straight, or across the river?

A. Just explain what you mean by straight; parallel with

414 the steamboat, the land, the tide, or what?

Q. Parallel with the steamboat.

A. Well, I should judge it was pretty near parallel with the steamboat Cordts.

Q. How about the land?

A. The land makes closer there at the point where they make the course. It would naturally work on the west land there.

Q. It wasn't up and down the stream, was it, as the stream goes?

A. I don't know how it would be any other way where you round a point almost fair with equal distance off the land, that is till you get just below it.

Q. Has your tug power enough to change the direction of a tow under the conditions which existed that night?

A. Well, I think that would be owing to the speed of the tow and the heft of it.

Q. The tow as it existed that night and at the speed it was going that night—do you think you could materially change the course of the tow?

A. I think we could change it somewhat, yes, sir.

Q. How many minutes of pushing would change the direction of the tow materially?

A. It wouldn't take a great many minutes to change it. You couldn't change it two or three hundred feet, nor you couldn't change

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it 100 feet, not with a steamboat hooped up—a steamboat on the hawser. We could change it, I suppose, more than half that distance, fifty feet or more. I couldn't tell you whether we changed the course of this boat or not.

415 Q. Don't you know if you had been there two or three minutes before, you could have changed it enough to have avoided this collision?

A. No, I don't.

Q. You deny that that is the case?

A. I deny that I know it.

Q. Isn't it your opinion that you could have done it as a seafaring man and as a navigator?

A. If we had been there a couple of minutes before?

Q. Yes.

A. Probably could if we had been there a couple of minutes before.

JOHN F. CODY, sworn for defendant, testified:

Direct examination:

By Mr. VAN ETTEN:

I live at Newburgh, and am Agent for the Cornell Steamboat Company. On October 30, 1908, I was on the steamer Rose, and remember going down towards these drills that night. I saw a steam lighter or canaler there; she was on the east side of the Cordts' tow and wasn't a great ways away; she was going by the tow. I didn't see which course she took when she got down by the drills. I know she passed the tow, but didn't see her after that. It was a dark night. The stars were out I guess. It blow'd pretty hard from the northwest. I am not a licensed navigator.

Defendant rests.

Testimony closed.

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416 *Opinion of Referee.*

New York Supreme Court.

Action No. I.

PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
vs.
THE CORNELL STEAMBOAT COMPANY, Defendant.

Action No. II.

PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
vs.
THE CORNELL STEAMBOAT COMPANY, Defendant.

Action No. III.

PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
vs.
CORNELL STEAMBOAT COMPANY, Defendant.

I regard it extremely doubtful whether the plaintiff under the permits produced and put in evidence had lawful authority to anchor its boats and barges permanently in the river at the place where the several collisions occurred.

417 The permit dated February 2, 1906, is the only one signed by the Secretary of War, and that by its terms relates to the river near New Hamburg, and not to the Storm King line of work.

The other two papers, dated respectively March 22nd, 1907, and February 24th, 1908, are signed by officers of the army. I am not referred to any statute of the United States conferring authority upon army officers to authorize such obstructions.

The statute which is claimed to be the source of authority for these so-called permits (Section 10, Act of Congress, March 3, 1899—U. S. Compiled Statutes, 1901, page 3541)—confers authority in certain cases upon the Secretary of War to permit work to be done in navigable waters in places recommended by the Chief of Engineers, but no authority to issue a permit in the first instance is conferred upon the Chief of Engineers.

As I construe this statute, no obstruction in navigable waters may be permitted by the Secretary of War, unless the structure of which it may be a part has been authorized by Congress. This seems to me to be clear from the first part of the Section, which is as follows:

"That the creation of any obstruction not affirmatively authorized "by Congress to the navigable capacity of any of the waters of the "United States is hereby prohibited."

I do not decide this question, however, as in my opinion the plaintiff's right to recover in these actions is not dependent upon the existence of a lawful permit to obstruct the navigation of the river.

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418 Assuming that the permits issued to the Board of Water Supply of the City of New York were not authorized by law, and that the plaintiff's barges were unlawful obstructions in the river, the defendant was not for that reason absolved from the exercise of reasonable care, and if the proximate cause of the collisions was the negligence of the defendant, it is liable for the damages sustained by the plaintiff.

Austin vs. N. J. S. B. Co., 43 N. Y. 75.
Silliman vs. Lewis, 49 N. Y. 379.
The Annex No. 5, 117 Fed. Rep. 754.
The Edmond L. Levy, 108 Fed. Rep. 435.
(Affirmed 144 Fed. Rep. 664.)

The question presented, therefore, is whether the defendant's steam tugs, at the time of the several collisions, were navigated with reasonable and ordinary care. In my opinion they were not.

The defendant knew that these barges and scows were anchored in the river; that they were placed there under what was claimed to be a lawful permit, and under the authority of the statutes of this state conferring power upon the Board of Water Supply of the City of New York, and that they were a part of the work of a great public improvement. Upon neither of the occasions when a collision occurred was there any extraordinary condition of wind and tide. On each occasion the tide was a strong ebb, and on July 9th and October 28th there was practically no wind. On October 30th there was a strong northwest wind which had a tendency to blow the tow away from the barge with which it collided. The wind, however, created no difficulty in navigation, as Captain Elmendorf, the captain
419 of the towing tug, testified that the tow was small (11 boats) and that the wind and tide did not hurt him.

At the time of each collision lights on the river and on the shore were visible for several miles, and the lights on the barges anchored by the plaintiff were visible for a distance of more than a mile, and were seen by the captains of the towing tugs. There was no difficulty in navigating a tow between the barges. This is plain from the fact that tows similar to those on the nights of the several collisions were daily navigated up and down the river, passing between these barges both before and after the several collisions without colliding with the barges. And it may be presumed, I think, that upon some of the nights the weather conditions must have been more unfavorable to navigation than they were upon any one of the nights when the collisions occurred.

The captain of the tugs which hauled the tows were all experienced men and had navigated tows between these barges without accident hundreds of times. Mr. Coykendall testified: "It was not difficult to "handle a tow, but a tow must be handled very differently from a "boat moving alone, much more time given to shape your course."

The location of the several scows was well known to all the captains.

In reference to the collision on the night of July 19th, it appeared that a scow had anchored at boring 23 on July 16th, which had the

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effect to narrow the channel, but Captain Pratt, of the Pocohontas, the towing tug, had been notified of that fact and he was well
420 aware of the location of that barge at boring 23 as he approached the obstruction. The weight of the evidence is that at or about the location of the scows and barges the ebb tide sets to the east and has a tendency to carry a boat or other floating object in a southeasterly direction.

On the occasion of the first collision, on the night of July 19th, the helper tug Victoria had gone ahead of the tow and lay just south of the barge anchored at boring 21 in order to mark its location.

Under the conditions of the weather prevailing on the night of July 19th, and the knowledge which Captain Pratt had of the location and the position of the scows at borings 21 and 23, the collision was in my judgment inexcusable. The only excuses offered were:

First, the confusion in the captain's mind of the lights on the barges with lights on the shore.

Second, a light in a small boat going to the east, and

Third, a stern light on a passing yacht.

It is plain that the first and third facts had nothing to do with the course taken by the Pocohontas. That was fixed up near Polopel's Island, a couple of miles north, and it was not altered until the Pocohontas had passed the barge at boring 21 with which the tow collided.

I cannot believe the light in a small boat had any effect on the course taken by the Pocohontas. The boat was in motion and the light was a lantern and it was too small and too near the
421 water to have been taken for an anchor light on the barge. Moreover, the fact that it was moving showed plainly that it was not an anchor light.

The mistake made by Captain Pratt was, in the first place, steering too far to the westward, within one hundred to one hundred and fifty feet of the barge at boring 21, and in the second place, in altering his course to the eastward too soon. He testified that when the Victoria, his helper tug, came out from Cornwall it came alongside of the Pocohontas, and the captain asked:

"Shall I go down to locate that drill?" Says I, "Yes, go ahead." "The lights were confused down there that time. So the captain of "the Victoria proposed to go down ahead and locate the drill so we "would know just how she lay there." * * * "At this time "(when the yacht passed) the Victoria had gone down ahead and "rounded up to the westward of what proved to be this west drill. "Just then the Victoria blowed two whistles. This yacht answered "with two whistles. I kept my course down the river fully expecting "I was going to clear. The tow was coming straight after "wards." * * * "We kept on and I saw we were going a little "close, and I hauled the steamboat Pocohontas a little to the east "ward. I didn't dare haul her very strong because if you head the "boat to the eastward you will swing the tail end of the tow the other "way. I kept her down very straight, and after a little bit when "got abreast of the drill with the head tier of the tow—I thought that "we was going to clear and I knew two or three lengths, two or three

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"ranges—were going to clear anyway, and then I hove my
422 "wheel hard aport and hauled her hard to the westward in
"expectation that I would swing the tail end of the tow clear.
"At this time the Victoria blowed five or six short blasts of the whis-
"tle. * * * That indicated nothing to me but that there was
"danger back there on the tow."

Now I fail to understand why when Captain Pratt saw his tow was "going a little too close" he altered the course of his tug to the eastward. The effect of that change was to bring the tail of the tow closer to the barge and to increase the chance of collision. There was no necessity for this alteration of the course, and it seems to me to have been a careless thing to do. Especially was this so if as Captain Pratt testified "the tail end of the tow was a little to the westward "of the head tier." The captain says: "I didn't dare haul her very "strong because if you head the boat to the eastward you will swing "the tail end of the tow the other way."

Why did he haul eastward at all? If he had kept the course he was steering he would have probably gone clear. If he was a little too close he should have altered his course a little to the west and the end of his tow would have swung to the east; or, if, as the majority of the defendant's witnesses testified, the current sets to the east at that point in an ebb tide, if he had stopped his tug the tide would probably have carried the tow clear of the barge.

Captain Pratt seems to have done the one thing which made the collision a certainty.

The weather conditions on October 28th were similar to
423 those on July 19th, except that the night was rainy. The tide was strong ebb, the water smooth, the wind light, from the north or west. Lights were visible for a distance of several miles, and the lights on the scows were seen by the captain of the Osceola, the towing tug, more than a mile away.

The testimony as to the course steered by the Osceola is contradictory. The plaintiff's witnesses testified that the tug passed close to boring 23, while the captain testified that he steered direct for boring 21 until within 200 feet of it, and then altered his course to the east slightly and passed about 100 feet to the east of boring 21.

He testified that his tow was straight behind him until the second tier of boats was *passed* the drill, when he noticed the rear of the tow "sagging off pretty fast to the eastward."

I am not convinced that the testimony of the captain is correct.

If the tug had been steered direct for boring 21, and its course then changed to the east, the fact would have been to throw the tail end of the tow to the west. A similar manœuvre of Captain Pratt on July 19th, and Captain Elmendorf on October 30th, under similar conditions of weather and tide, brought the tail end of their tow in collision with the scow anchored at boring 21, and I do not understand how the same manœuvre could have on October 28th brought the tail end of the tow in collision with scow at boring 23.

Captain Scouten testified that the second tier from the head of the

tow had passed the drill before he noticed the tail end swing-
424 ing to the east and before he changed the course of his tug to the east.

It seems quite clear that if the tug and the first two tier of boats passed 100 feet east of drill 21 the tail end of the tow could not have swung to the east so far as to collide with the barge at boring 23.

Hole 23 was 599 feet east of hole 21.

The canal boats were 90 to 100 feet long, and 17 feet 16 inches wide. There were 24 boats in the tow in six tiers of 4 each.

The width of the tow, therefore, was about 70 feet, leaving a space of at least 250 feet clear water between the east side of the tow and the barges at boring 23.

Now, it is clear that the end of a tow going south on an ebb tide would have to swing at a pretty sharp angle to hit a boat 250 feet to the east, and it would have to swing to the east, and it would have to swing to the east pretty fast to do this within a space of 400 feet. But it was not the tail end of the tow which collided with the scow on this occasion, but the boats in the third tier from the front, and it is plain that this could not have happened if the tug and second tier of boats in the tow passed 100 feet to the east of boring 21.

The testimony of the plaintiff's witnesses is more consistent with the accident, and the current of the river, and I find as a fact, that the Osceola was steered too close to boring 23, and that due allowance was not made for the set of the tide and the collision was presumably due to that fact.

In my opinion there was also negligence on the part of the
425 captain of the Primrose in failing to make an earlier effort to push the tail end of the tow to the west.

Captain Calligan testified that in an ebb tide the whole tow at that point in the river sags to the east. Such being the fact, the Primrose on approaching the barges should have been on the east side of the tow. It was on the west side where it could render no assistance in keeping the tow straight, and it was not until the collision was imminent that the Primrose changed her position and attempted to push the end of the tow to the west.

The third collision on October 30th was in my opinion due to the fact that the course steered was too near the westerly drill.

Captain Elmendorf testified that the tow passed about 100 feet or a little more east of the westerly drill. The course was laid so close that the second tier of boats from the head of the tow, and every other tier behind, struck the scow at boring 21.

The excuse offered for being so close to the scow was that a steam lighter, going south, passed the tug to the east so close that the tug's course could not be altered. The position of the lighter, however, did not affect the original course taken by the tug, and in my opinion it does not relieve the captain of the tug from the charge of negligence, that the position of another boat in the river prevented him from altering his course after he discovered his error.

But if there was any chance of the tow upon its original course passing the scow it was destroyed by the alteration of the

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426 course of the tug to the east. The effect of this change, Captain Elmendorf testified, was to throw the end of the tow to the west and it was the same manœuvre which, in my judgment, caused the collision on July 19th. Whether it was the sole cause of the collision on the night of October 30th, I think is doubtful, but it was a negligent thing to do under the circumstances. The ebb tide and a strong northwest wind *was* carrying the tow to the east, and it was poor judgment to change the course of the tug and thus counteract the effect of the wind and the tide. I think, however, it is quite clear that the cause of the collision was in laying a course too close to the westerly drill, and such was the opinion of Captain Elmendorf himself as stated on his cross-examination. There was no necessity for laying a course so close to the westerly drill, and as I have already said, there was no difficulty in navigating a tug between the barges.

When, therefore, under favorable conditions of weather the tow was steered directly into the barges, the only conclusion that can be reached is that the collision was due to lack of care on the part of the captain of the towing tug.

My conclusion, therefore, is that each of the three collisions, which was made a subject of complaint in the three actions, was due to the negligence of the defendant, and that the plaintiff is entitled to recover the damages which it sustained.

In Action No. 1, growing out of the collision of July 19th, the damages claimed consist solely of the value of tools, appliances and material lost or destroyed and expenses necessarily incurred in

427 restoring the plant to a condition which permitted resumption of work.

I allow all the items as to which proof was given, excepting the charge for the use of launch for 57 days, amounting to $85.50. Omitting this item, the damages proved amount to $3,347.83, for which plaintiff is entitled to judgment.

In Action No. 2 and No. 3, growing out of the collision of October 28th and October 30th, there is a claim for loss of pipes, anchor, anchor chains and other materials and expenses, arising out of the collision.

There is no dispute as to the items constituting this part of the loss, and the amount in Action No. 2 is $4,000.82, and in No. 3, $2,189.86. In addition, however, to this loss, the plaintiff in each of the Actions No. 2 and No. 3 claims to recover the profits which it was prevented from earning upon the contracts which it had with the Board of Water Supply of the City of New York for the drilling of holes 21 and 23.

The effect of the collisions of October 28th and October 30th was that the work could not be resumed at either boring, and the plaintiff claims that as a result of the collision it was deprived of the right and benefit of performing its contract with the Board of Water Supply of the City of New York, and thereby sustained a loss of the profits and gains which would have resulted from such performance. The rule is well settled that loss of profits resulting from a tort may be recov-

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ered from the wrong-doer, provided, they are such as might be
428 expected to follow from the wrongful acts and are certain both in their nature and the cause from which they proceed.

Schile vs. Brokhahus, 80 N. Y. 614.
Swain vs. Schieffelin, 134 N. Y. 471.
Snow vs. Pulitzer, 142 N. Y. 263.
Anvil Mining Co. vs. Hunter, 153 U. S. 540.

Action No. 3 falls within this rule.

The proof establishes with reasonable certainty as the result of the collision a loss of profits upon the contract for boring hole 21 of $6,840, and the plaintiff is, therefore, entitled to recover in action No. 3, $6,840 plus $2,189.86, amounting to $9,029.86.

In Action No. 2, it is proven with reasonable certainty that rock would have been reached at a depth of 700 feet. I find that if the plaintiff had completed that boring under its contract with the Board of Water Supply that its profits on the contract would have been $10,785.00. In my opinion, however, the plaintiff cannot be said to have sustained that loss. As the boring could not be continued at hole 23, after the collision, nor another hole sunk at the same spot, the Board of Water Supply directed the plaintiff to drill another hole 80 feet east of hole 23 of the same depth, which was known as boring 24, for which the Board of Water Supply agreed to pay the plaintiff the same price as it would have received if it had completed boring 23. The plaintiff was engaged in sinking boring 24 under its contract with the Board of Water Supply at the time of the trial, and the hole had been drilled to a depth of upwards 700 feet and rock had been reached at a depth of 708 feet. Hole 24 was drilled
429 for the purpose of obtaining the same information as would have been obtained from hole 23, and the Division Engineer Mr. Swift testified that it would not have been drilled if hole 23 had been put down as contracted for.

The plaintiff, therefore, was by the contract to sink hole 24 put in precisely the same legal position as it was with the contract to drill hole 23.

There is no proof that it lost any money in drilling hole 23, as Mr. Belknap testified that the work done cost $10,800 and the plaintiff received from the City therefor $11,820.

The plaintiff was likewise paid for all the work it did on hole 24 down to the same depth which had been reached on hole 23 at the time of the collision. Its chances of success, therefore, in sinking hole 24 to the full depth of 1,000 feet, as contracted for, and therefore earning the increasing compensation which the contract gave at a lower depth, was the same as in hole 23 at the time of the accident.

The profits which it claims were lost on hole 23 were gained on hole 24.

The plaintiff in my judgment was put in the same position as it would have been if the damages had been repaired at hole 23 and that hole had been sunk to the depth specified in the contract.

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To hold otherwise would give the plaintiff the profits claimed to have been lost on hole 23, and the profits on hole 24 which it would not have earned if hole 23 had been sunk to the depth contracted for.

430 It thus would not only be made good for the loss sustained, but would be about $10,000 better off than if the accident had not happened.

I therefore refuse to sustain the claim for profits lost in Action No. 2, and award plaintiff damages in that action to the amount of $4,000.82.

Requests to find may be submitted to me on or before August 15th, 1910.

431 (PLAINTIFF'S EXHIBIT 1.)

WAR DEPARTMENT,
WASHINGTON, *February* 2, 1906.

SIR: In answer to your application of 23d ultimo, addressed to Colonel W. R. Livermore, Corps of Engineers, permission, revocable at will by the Secretary of War, is hereby granted the Board of Water Supply of the City of New York, in accordance with the recommendation of the Chief of Engineers, U. S. Army, to drive piles and anchor boats, as specified in said application, in the Hudson River, near New Hamburg, N. Y., on line shown on map attached hereto, subject to the following conditions, viz:

1. That work shall not be in progress simultaneously on more than three borings on each of the three lines shown on the attached maps.

2. That there shall not be, at any time, less than 800 feet clear space between obstructions, except within 400 feet of either bank of the river.

3. That the Board of Water Supply of the City of New York shall hold itself responsible for any and all damages that may be inflicted upon navigation interests by said obstructions through any and all causes whatsoever.

4. That each single obstruction shall be entirely removed as soon as each boring is finished.

5. That all obstructions shall be entirely removed when, in the opinion of the Secretary of War, said removal shall become necessary to public interest.

432 6. That said Board shall comply with the rules and regulations of the Light-House Establishment of the Department of Commerce and Labor concerning lights, sound signals for fogs, etc., and shall maintain on each obstruction such other lights, flags or other signals as the Engineer Officer of the United States Army may prescribe.

7. That the work herein permitted to be done shall be subject to the supervision and approval of the local officer of the Corps of En-

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gineers, U. S. Army, whose address is Army Building, New York City.

Very respectfully,
(Signed) ROBERT SHAW OLIVER,
Acting Secretary of War.

Mr. J. Waldo Smith, Chief Engineer, Board of Water Supply, City of New York, No. 299 Broadway, New York City.

Blue-print (5 of 56908 Engrs.) attached hereto.

(PLAINTIFF'S EXHIBIT 2.)

United States Engineer's Office,
Room F 7 Army Building,
39 Whitehall Street.

NEW YORK CITY, *March* 22, 1907.

Board of Water Supply, City of New York.

Mr. J. Waldo Smith, Chief Engineer, 299 Broadway, New York, N. Y.

SIRS: In response to your application of March 8, 1907,
433 and by authority of the Secretary of War, your permit granted July 2, 1906, to drive piles and anchor boats in the Hudson River, N. Y., in connection with making borings, is hereby modified so that paragraph- (*a*) and (*b*) shall read as follows:

(A) That on the Storm King line work shall not be in progress simultaneously on more than three borings, except within 800 feet of the East shore where additional borings may be made simultaneously with those outside of this limit.

(B) That there shall not be, at any time, less than 800 feet clear space between obstructions, except within 800 feet of the East shore.

Very respectfully,
(Signed) D. W. LOCKWOOD,
Colonel, Corps of Engineers, U. S. A.

(PLAINTIFF'S EXHIBIT 3.)

United States Engineer Office,
Room F 7 Army Building,
39 Whitehall Street.

NEW YORK CITY, *Feb.* 24, 1908.

Board of Water Supply, City of New York, 299 Broadway, New York City.

SIRS: In response to your application of January 31, 1908, permission is hereby granted to drive piles and anchor boats as requested therein, and to make borings within the zone shown on the blue-print submitted with your letter of February 14, 1908, subject to the following conditions:—

434 (*a*) That on the Storm King line, work shall not be in progress simultaneously on more than four (4) borings, except within eight hundred feet of the east shore, where additional borings may be made simultaneously with those outside of this limit.

(*b*) That except within eight hundred feet of the east shore there shall be left unobstructed, during the progress of the boring work, two channels, one at least twenty-five feet at mean low water, with a width of at least four hundred feet, and the other at least thirty feet deep at mean low water, with a width of at least six hundred feet in the clear.

(*c*) That the Board of Water Supply of the City of New York shall hold itself responsible for any and all damages that may be inflicted upon navigation interests by said obstructions through any and all causes whatsoever.

(*d*) That each single obstruction shall be entirely removed as soon as each boring is finished.

(*e*) That all obstructions shall be entirely removed, when, in the opinion of the Secretary of War, said removal shall become necessary to public interest.

(*f*) That the said Board shall comply with the rules and regulations of the Light-House Establishment of the Department of Commerce and Labor concerning lights, sound signals for fog, etc., and shall maintain such other lights and other signals on its plant anchored on the borders of the two channels specified in condition (*b*) as the Light-House Establishment may require, to indicate the approved channels.

435 (*g*) That the work proposed shall be subject to the supervision and approval of this office.

Very respectfully,

(Signed) JOHN D. KNIGHT,
Colonel, Corps of Engineers, U. S. A.

(Plaintiff's Exhibit 4.)

Contracts of 1906—No. 1.

Board of Water Supply of the City of New York.

(Cut.)

Information for Bidders, Forms of Proposal and Contract, Specifications and Forms of Bonds and Certificates for Making Test Borings in the Channel and Along the Shores of the Hudson River Near the Village of New Hamburg, Dutchess County, New York.

Information for Bidders.

The Board of Water Supply of The City of New York proposes to have certain test borings made in the channel and along the
436 shores of the Hudson river near the Village of New Hamburg, Dutchess County, New York. The borings will be through

water and earth and into rock to a total depth as great as 400 feet for any vertical hole if required by the Engineer. The number of borings to be made and their depths will depend on the results of the work as it progresses. It is expected that most of the borings will be made in the channel of the river at points not more than 4 miles up nor more than 4 miles down the river from said village. The total aggregate depth for which payment is to be made will be not less than 4,000 linear feet. Some inclined borings may be required of a length not exceeding 1,500 feet for each hole.

Attention is called to the depth of water in the channel of the Hudson river, shown on the charts of the United States Coast and Geodetic Survey to be as great as 90 to 100 feet; to the depth of the rock below the river bed as indicated approximately by the wash-borings recently made by the Board in the vicinity; and to the fact that in some places the bed rock underlying the river has very little or no covering of soil or earth, while in other places such covering is as great as 100 feet. Attention is also called to the fact that during the winter months the river and streams may be frozen over. The Contractor's appliances shall be such that he will be prepared to do his work thoroughly under the above mentioned conditions and maintain a satisfactory rate of progress.

Sealed bids or proposals for making these test borings will be received at the office of the Board, Room 909, No. 299 Broadway, The City of New York until Monday, February 5th, 1906, at 2 p. m. at which place and time they will be publicly opened by the Board and read.

437 All bids must be made upon the blank form of proposal attached hereto and should give the price for each item of the work proposed, both in writing and in figures, and be signed by the Bidder, with his address. Each bid must be inclosed in a printed envelope provided for the purpose by the Board, and sealed.

No bid will be received and deposited unless accompanied by a certified check upon a National or State bank in The City of New York, drawn to the order of the *the* Comptroller of The City of New York, for five hundred dollars ($500). Such check must not be inclosed in the sealed envelope containing the bid, but must be delivered to the Board, or its Secretary, who will give a proper voucher for the deposit.

Within three days after the decision as to who shall receive the contract, the Comptroller shall return all deposits made to the persons making the same, except the deposit made by the Bidder to whom the contract shall be awarded; and if the Bidder to whom the contract is awarded shall refuse or neglect, within ten days after due notice that the contract has been awarded, to execute the same, and furnish the security required, the amount of deposit made by him shall be forfeited to and be retained by the said City for such neglect or refusal and shall be paid into the General Fund of The City; but if the said Bidder to whom the contract is awarded shall execute the contract and furnish the said security within the time aforesaid, the amount of his deposit shall be returned to him. In case of delay in

awarding the contract, all the deposits will be returned at the
438 expiration of twenty days after the opening of the bids. If all bids be rejected, the deposits will be returned forthwith.

A bond or bonds in the sum of three thousand dollars ($3,000), with two sureties, householders or resident freeholders under the Laws of the State of New York, or a surety company incorporated under the Laws of the State of New York, or authorized by the Laws of said State to do business therein, will be required for the faithful performance of the contract. Sureties must be satisfactory to the Board. The names and residences of the sureties or the name of the surety company offered shall be stated in the bid or proposal.

The Bidder whose bid shall be accepted will be required to attend at the office of the Board in person, or, if a corporation, by a duly authorized representative, with the sureties offered by him, and to execute the contract and bond within ten days from the date of the service of the notice to that effect, delivered to him in person, or mailed to the address given in the bid; in case of failure or neglect so to do, he will be deemed to have abandoned the contract and as in default to The City.

Special attention is called to the uncertainty as to the amount of work to be done, or the aggregate depth of holes to be bored, which is evidenced by the very nature of the work required. Hence no approximate statement of quantities can be given other than that in Section 5 of the annexed specifications.

No bid shall be withdrawn, for any reason whatever, after it has been deposited with the Board.

439 No bid will be accepted from, nor contract awarded to, any person who is in arrears to the Corporation of The City of New York, upon debt or contract; or who is in default, as surety or otherwise, upon any obligation to the Corporation of The City of New York.

The Board reserves the right to reject any or all bids or to accept any bid, if it shall deem it to be to the interest of The City of New York so to do.

Proposals which are incomplete, conditional or obscure, or which contain additions not called for, erasures, alterations, or irregularities of any kind may be rejected as informal. Failure to name sureties will be sufficient cause for the rejection of a proposal.

——— ———,
——— ———,
——— ———,

Board of Water Supply.

Office of the Board, No. 299 Broadway, the City of New York.

Dated, THE CITY OF NEW YORK, *January* 3, 1906.

Bid or Proposal to the Board of Water Supply of the City of New York for Making Test Borings in the Channel and Along the Shores of the Hudson River Near the Village of New Hamburg, Dutchess County, New York.

NOTE.—The Bidder's name and residence must be inserted here, and in case of firms, the name and residence of each and every member of the firm must be inserted.

440 In case a bid shall be submitted by or in behalf of any corporation, the name of such corporation must be written here.

Made this 5th day of February, 1906, by American Diamond Rock Drill Company of Number 95 Liberty Street, City of New York.

The above-named, as Bidder, declares that the only person or persons interested in this bid or proposal as principal or principals is or are named above, and that no other person than hereinabove named has any interest in this proposal or in the contract proposed to be taken; that this bid or proposal is made without any connection with any other person or persons making a bid or proposal for the same purpose; that the bid or proposal is in all respects fair and without collusion or fraud, and that no member of the Board of Water Supply or of the Board of Aldermen, no head of a department, no chief of a bureau, deputy thereof, or clerk therein, nor other officer of The City of New York, nor any person in the employ of the Board of Water Supply, is or shall be or become, directly or indirectly, interested as contracting party, partner, stockholder, surety or otherwise in the performance of the contract, or in the supplies, work or business to which it relates, or in any portion of the profits thereof; that the names of the persons affixed to the sureties' consent hereto annexed were written by said persons, respectively, and that said persons are householders or free holders in The City of New York; that he has examined the form of contract and specifications, approved by the Corporation Counsel, and he proposes and agrees, if this proposal be accepted, that he will contract, in the form so ap-

441 proved, to perform all the work mentioned in said approved form of contract and specifications, and that he will accept in full payment therefor the following sums, to wit:

For making test borings, including the furnishing of all labor, materials and appliances necessary to do the work:

Item 1. For the first 4,000 linear feet, aggregate depth of vertical holes, the sum of Eleven and 25/100 dollars ($11 25/100) per linear foot.

Item 2. For vertical borings in excess of 4,000 linear feet, aggregate depth of holes, the sum of Nine 75/100 dollars ($9 75/100) per linear foot.

Item 3. For inclined borings the sum of Seven 75/100 dollars ($7 75/100) per linear foot.

The prices are to include and cover the performing of all the labor requisite or proper and the providing of all necessary machinery, tools, apparatus and other means of performing the work; and the doing of all the above mentioned work in the manner set forth and described in the specifications, and in the form of contract.

The Bidder further agrees to execute the contract and give the required security within ten days from the service of a written notice that said contract has been awarded to him.

If this proposal shall be accepted by the Board of Water Supply, and the Bidder shall refuse or neglect, within ten days after due notice that the contract has been awarded, to execute the same, and to give bonds in the sum of three thousand dollars ($3,000), with sureties satisfactory to the said Board, then the Board may, at its option, determine that the Bidder has abandoned the con-
442 tract, and thereupon the proposal and the acceptance shall be null and void, and the certified check for five hundred dollars ($500), accompanying this proposal, shall be forfeited to and retained by The City of New York as liquidated damages for such neglect or refusal, and shall be paid into the General Fund of the said City, but if the said Bidder to whom the contract is awarded shall execute the contract, and furnish the said security within the time aforesaid, the certified check shall be returned to him within three days.

NOTE.—Each and every person bidding and named above must sign here. In the case of firms give the first and last name of each party in full, with residence.

In case a bid shall be submitted by or in behalf of any corporation, it must be signed in the name of such corporation by some authorized officer or agent thereof, who shall also subscribe his name and office. If practicable the seal of the corporation shall be affixed.

AMERICAN DIAMOND ROCK DRILL CO., [L. S.]

(Signed) By C. H. TOMPKINS.

NOTE.—The person or all the persons making this bid must swear to the affidavit on page 11, and in the case of a corporation this affidavit must be made by one of its officers as an individual.

STATE OF NEW YORK,
County of New York, ss:

C. H. Tompkins, President of American Diamond Rock Drill Company, being duly sworn, says, each for himself, that the several matters in the above bid are in all respects true.

(Signed) C. H. TOMPKINS.

443 Subscribed and sworn to before me this 5th day of February, 1906.

(Signed) M. J. MULRENAN,
Commissioner of Deeds, the City of New York, or Notary Public, County of ——.

(Blanks for consent of Sureties and Affidavits are on pages 13 to 15.)

The Bidder is requested to state below what work of a similar character to that included in the proposed contract he has done and give references which will enable the Board to judge of his responsibility, experience, skill and business standing.

Aqueduct Commissioners.
Cross River Dam Sites.
Croton Falls Dam Sites.
New East River Bridge Commission.
Williamsburg Bridge.
Department Bridges.
Manhattan Bridge.
Pennsylvania Railroad Tunnels.
Jerome Park Reservoir.
Brooklyn, N. Y. & Jersey City Terminal R'way Co.
East River Tunnel.
U. S. Navy—Bureau of Yards & Docks.
Portsmouth Navy Yard, Dry Dock.

Sureties' Consent.

NOTE.—This consent or agreement must be signed by the sureties, with their places of business or residences added.

In Consideration of the premises, and of One Dollar to us and each of us in hand paid, by The City of New York, the receipt whereof is hereby acknowledged,

444 We, the undersigned, jointly and severally, consent and agree, that if the contract for which the preceding bid or proposal is made be awarded to the person or persons making the same, we will, upon its being so awarded, become bound as his or their or its sureties for the faithful performance of said contract; and if the said person or persons shall omit or refuse to execute such contract and give the proper security within ten days after written notice that the same is ready for execution, if so awarded, we will pay, without proof of notice or demand, to The City of New York, any difference between the sum to which such person or persons would be entitled upon the completion of such contract, and the sum which The City of New York may be obliged to pay to the person or persons to whom the contract shall be awarded at any subsequent letting; the amount in each case to be calculated upon the estimated amount of the work, labor and materials by which the bids are tested.

In Witness Whereof, we have hereunto set our hands, this 5th day of February, one thousand nine hundred and six.

(Signed) THE METROPOLITAN SURETY COMPANY,
By PRES'T & SECRETARY.

The adequacy and sufficiency of the above-named sureties are approved.

Dated this — day of —— 1906.

—— ——, *Comptroller.*

NOTE.—If the surety is a householder, the word house must be written in the following depositions; if a freeholder, the word free must be written. Each of these depositions must be signed by one of the proposed bondsmen and sworn to.

445 STATE OF NEW YORK,
County of New York, ss:

The above-named —— —— being duly sworn, says that he is a — holder in The City of New York, and is worth the sum of — dollars ($—), over and above all his debts of every nature, over and above his liabilities as bail, surety, or otherwise, and over and above all his property which is exempt by law from execution; and that he has offered himself as a surety in good faith, and with an intention to execute the bond required by law.

—— ——.

Subscribed and sworn to before me, this — day of ——, 1906.

——,
Commissioner of Deeds, The City of New York, or Notary Public, County of —.

STATE OF NEW YORK,
County of New York, ss:

The above-named —— —— being duly sworn, says that he is a — holder in The City of New York, and is worth the sum of — dollars ($—), over and above all his debts of every nature, over and above his liabilities at bail, surety or otherwise, and over and above all his property which is exempt by law from execution; and that he has offered himself as a surety in good faith,
446 and with an intention to execute the bond required by law.

—— ——.

Subscribed and sworn to before me, this — day of ——, 1906.

——,
Commissioner of Deeds, The City of New York, or Notary Public, County of —.

The Board of Water Supply of The City of New York.

Contract for Making Test Borings in the Channel and Along the Shores of the Hudson River, near the Village of New Hamburg, Dutchess County, New York.

NOTE.—The marginal notes printed on the pages of this pamphlet are intended for convenience of reference only, and do not form part of the contract or the specifications.

This agreement, made and entered into this First day of March, in the year one thousand nine hundred and six, by and between

The City of New York, acting by and through the Board of Water Supply, by virtue of the power vested in it by Chapter 724 of the Laws of 1905, of the State of New York, party of the first part, and American Diamond Rock Drill Company, hereinafter designated as the Contractor, party of the second part,

Witnesseth, that the parties to these presents each in consideration of the undertakings, promises and agreements, on the part of
447 the other herein contained, have undertaken, promised and agreed, and do hereby undertake, promise and agree, the parties of the first part for themselves, their successors, and assigns, and the party of the second part for itself and its heirs, executors and administrators or successors as follows:

ARTICLE I. Wherever the words defined in this article, or pronouns used in their stead, occur in this contract and the specifications hereto attached they shall have the meanings here given.

The City shall mean the Corporation of The City of New York.

Board shall mean the Board of Water Supply, or any body or officer duly authorized to act for The City in the execution of the work required by this contract.

Chief Engineer shall mean the person holding the position or acting in the capacity of Chief Engineer of the Board, or any person whom the Board may designate to act in the stead of the Chief Engineer in the case of the latter's absence or disability.

Engineer, whenever not qualified, shall mean the Chief Engineer of the Board, acting either directly or through his properly authorized agents, such agents acting severally within the scope of the particular duties intrusted to them.

Contractor shall mean the party of the second part, above designated, entering into this contract for the performance of the work required by it, and the legal representatives of said party, or the agent appointed to act for said party in the performance of the work.

ART. II. Whenever the Chief Engineer aforesaid shall
448 be unable to act in consequence of absence or other cause, then such Engineer, or Assistant, as the Board shall designate, shall perform all the duties, and be vested with all the power herein given to the said Chief Engineer.

ART. III. To prevent disputes and litigations, the Engineer shall in all cases determine the amount, quality, and acceptability of the work which is to be paid for under this contract; shall determine all questions in relation to said work and the performance thereof, and shall in all cases decide every question which may arise relative to the fulfillment of this contract on the part of the Contractor. His estimate and decision shall be final and conclusive upon said Contractor, and in case any question shall arise between the parties hereto, touching this contract, such estimate and decision shall be a condition precedent to the right of the Contractor to receive any money under this contract.

ART. IV. The Engineer shall make all necessary explanations as to the meaning and intention of the specifications, shall give all orders and directions contemplated therein or thereby and in every

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case in which a difficult or unforeseen condition shall arise in the performance of the work required by this contract.

ART. V. The Contractor shall do all the work and furnish all the tools and appliances, necessary or proper for performing and completing the work required by this contract, in the manner and within the time hereinafter specified. He shall complete the entire work to the satisfaction of the Board, and in accordance with the specifications herein mentioned, at the prices herein agreed upon and fixed therefor. All the work and labor to be done and fur-
449 nished under this contract, shall be done and furnished strictly pursuant to and in conformity with the attached specifications, and the directions of the Engineer as given from time to time during the progress of the work, under the terms of this contract, which said specifications form parts of this agreement.

ART. VI. The Contractor shall commence work within ten days after the signing and sealing of the contract, and shall so conduct and prosecute the work that 4,000 linear feet of borings shall be completed during each month thereafter, unless otherwise directed by the Engineer, until the whole work shall be completed, and all the work shall be completed on or before July 1, 1906.

ART. VII. The Board reserves the right of suspending the whole or any part of the work herein contracted to be done, if it shall deem it for the interest of The City of New York so to do, without compensation to the Contractor for such suspension other than extending the time for completing the work as much as it may have been delayed by such suspension.

If the said work shall be delayed for the reason that The City has not provided the Contractor with the necessary permits to proceed with the work, then, and in that case, and in every such case, the Contractor shall be entitled to so much additional time wherein to perform and complete this contract on his part as the Engineer shall certify in writing to be just; but no allowances, by way of damages, shall be made for such delay.

ART. VIII. Neither the number nor the aggregate depth of the borings to be made under the contract can be even approxi-
450 mately estimated, as is stated in the Information for Bidders attached hereto; but the aggregate depth of holes to be paid for shall not be less than that stipulated in Section 5 of the specifications.

ART. IX. If the Contractor shall claim compensation for any damage sustained by reason of the acts of the Board, or its agents, he shall, within five days after the sustaining of such damage, make a written statement of the nature of the damage sustained, to the Engineer. On or before the fifteenth day of the month succeeding that in which any such damage shall have been sustained, the Contractor shall file with the Engineer an itemized statement of the details and amount of such damage, and, unless such statement shall be made as thus required, his claim for compensation may be forfeited and invalidated, and he shall not be entitled to payment on account of any such damage.

ART. X. The Engineer shall be furnished with every reasonable

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facility for ascertaining that the work is in accordance with the requirements and intention of this contract, but the inspection of the work shall not relieve the Contracor of any of his obligations to fulfil his contract as herein prescribed.

ART. XI. The Contractor shall employ only competent, skillful men to do the work, and whenever the Engineer shall notify the Contractor, in writing, that any man on the work is, in his opinion, incompetent, unfaithful, disorderly or otherwise unsatisfactory, such man shall be discharged from the work, and shall not again be employed on it, except with the consent of the Engineer.

ART. XII. The Contractor shall keep himself fully informed of all laws, and municipal ordinances and regulations in any
451 manner affecting those engaged or employed in the work, or the appliances used in the work, or in any way affecting the conduct of the work, and of all orders and decrees of bodies or tribunals having any jurisdiction or authority over the same. If any discrepancy or inconsistency should be discovered in this contract, or in the specifications herein referred to, in relation to any such law, ordinance, regulation, order or decree, he shall forthwith report the same in writing to the Engineer. He shall at all times himself observe and comply with and shall cause all his agents and employees to observe and comply with all such existing and future laws, ordinances, regulations, orders and decrees; and shall protect and indemnify The City and the Board and their officers and agents against any claim for liability arising from or based on the violation of any such law, ordinance, regulation, order or decree, whether by himself or by his employees.

ART. XIII. The Contractor shall give his personal attention constantly to the faithful prosecution of the work; he shall not assign, transfer, convey, sublet or otherwise dispose of this contract, or his right, title or interest in or to the same or any part hereof, without the previous consent in writing of the Board indorsed hereon or hereto attached; and he shall not assign, by power of attorney or otherwise, any of the moneys to become due and payable under this contract, unless by and with the like consent signified in like manner. If the Contractor shall, without such previous written consent, assign, transfer, convey, sublet, or otherwise dispose of this contract, or of his right, title or interest therein, or any of the moneys to
452 become due under this contract, to any other person, company or other corporation, this contract may, at the option of the Board, be revoked and annulled and The City shall thereupon be relieved and discharged from any and all liability and obligations growing out of the same to the Contractor, and to his assignee or transferee; provided that nothing herein contained shall be construed to hinder, prevent or affect an assignment by the Contractor for the benefit of his creditors, made pursuant to the statutes of the State of New York; and no right under this contract, or to any money to become due hereunder shall be asserted against The City in law or in equity, by reason of any so-called assignment of this contract, or any part thereof, or of any moneys to grow due here-

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under, unless authorized as aforesaid by the written consent of the Board.

ART. XIV. The Contractor shall take all responsibility of the work, shall bear all losses resulting to him on account of the amount or character of the work, or on account of the weather or other cause; and he shall assume the defense of, and indemnify and save harmless, The City and the Board, their officers and agents from all claims of any kind.

ART. XV. The Contractor shall, during the performance of the work, take all necessary precautions and place proper guards for the prevention of accidents; shall put up and keep at night suitable and sufficient lights, and shall indemnify and save harmless The City and the Board, their officers and agents from all damages and costs to which they may be put by reason of injury to the person or property of another resulting from negligence or carelessness in the performance of the work, or in guarding the same, or from
453 any improper materials, implements or appliances used in its construction, or by or on account of any act or omission of the Contractor or his agents. The whole, or so much of the moneys due under and by virtue of this contract as shall or may be considered necessary by the Comptroller, shall or may be retained by The City until all suits or claims for damages as aforesaid shall have been settled, and evidence to that effect furnished to the satisfaction of the Comptroller.

ART. XVI. The Contractor shall hold himself responsible for any claims made against The City for any infringements of patents, by the use of patented articles in the performance and completion of the work, or any process connected with the work agreed to be performed under this contract or of any materials used upon the said work, and shall save harmless and indemnify The City for all costs, expenses and damages which The City shall be obliged to pay by reason of any infringement of patents used in the performance and completion of the work.

ART. XVII. If the work to be done under this contract shall be abandoned by the Contractor, or if this contract shall be assigned, or the work sublet by him, otherwise than as herein specified, or if at any time the Engineer shall be of the opinion, and shall so certify, in writing, to the Board that the performance of the contract is unnecessarily or unreasonably delayed, or that the Contractor is wilfully violating any of the conditions or covenants of this contract, or the specifications, or is executing the same in bad faith, or not in accordance with the terms hereof, the Board shall notify the Contractor to discontinue all work, or any part thereof, under
454 this contract, by a written notice to be served upon the Contractor, either personally or by delivering or depositing said notice in the mail as hereinafter provided, or by leaving it with his agent in charge of the work, or with any employee found on the work; and thereupon the Contractor shall discontinue the work, or such part thereof, and the Board shall thereupon have the power to contract for the completion of the contract in the manner prescribed by law, or to place such and so many persons as it may deem

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advisible, by contract or otherwise to work at and complete the work herein described, or such part thereof, and to charge the expense to the Contractor. The expense so charged shall be deducted and paid by The City out of such moneys as may be due or may at any time thereafter grow due to the Contractor under and by virtue of this contract, or any part thereof. And in case such expense shall exceed the amount which would have been payable under the contract if the same had been completed by the Contractor, he shall pay the amount of such excess to The City; in case such expense shall be less than the sum which would have been payable under the contract if the same had been completed by the Contractor, then the Contractor shall forfeit all claim to the remainder; and when any particular part of the work is being carried on by the Board, by contract or otherwise, under the provisions of this clause of the contract, the Contractor shall continue the remainder of the work in conformity with the terms of this contract, and in such manner as in no wise to hinder or interfere with the persons or workmen employed, as above provided, by the Board, by contract or otherwise, to do any part of the work, or to complete the same under the provisions of this article of the contract.

ART. XVIII. The Contractor shall pay to The City all expenses, losses and damages, as determined by the Engineer, incurred in consequence of any defect or mistake of the Contractor or his employees, or the making good thereof. The Board shall have the right in its discretion to extend the time for the completion of the work beyond the time stated in this contract. The permitting of the Contractor to go on and finish the work, or any part of it, after the time fixed for its completion, or after the date to which the time for completion may have been extended shall in no wise operate as a waiver on the part of The City of any of its rights under this contract.

The Board reserves the right to cancel the contract at any time after the completion of 4,000 linear feet of borings, aggregate depth of holes, if the work is not being executed satisfactorily or if a proper rate of progress is not being made.

ART. XIX. The City may keep any moneys which would otherwise be payable at any time hereunder, and apply the same, or so much as may be necessary therefor, to the payment of any expenses, losses or damages, as determined by the Engineer, incurred by The City or the Board, and may retain until all claims shall have been settled so much of such moneys as the Board shall be of opinion will be required to settle all claims against The City and the Board and its officers and agents, and all claims for labor on the work or materials for the work, notice of which signed and sworn to by the claimants, shall have been filed in the office of the Board, or
456 The City may make such settlements and apply thereto any moneys retained under this contract.

The Contractor shall furnish the Board with satisfactory evidence that all persons who have done work, or furnished materials under this agreement, and who have given written notices to the Board before, or within ten days after, the final completion and acceptance

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of the whole work under this contract, that any balance for such work or materials is due and unpaid, have been fully paid or satisfactorily secured. And in case such evidence is not furnished as aforesaid, such amount as may be necessary to meet the claims of the persons aforesaid may be retained from the money due the Contractor under this contract, until the liabilities aforesaid shall be fully discharged, or such notices withdrawn.

ART. XX. The City will pay, and the Contractor shall receive, in full compensation for furnishing all the materials and labor, and for performing and completing all the work which is necessary or proper to be furnished or performed, in order to complete the entire work in this contract described and specified, and in said specifications described, and also for all loss or damages arising out of the nature of the work aforesaid, or from the action of the elements, or from any unforeseen obstruction or difficulty encountered in the prosecution of the work, and for all risks of any description connected with the work, and for all expense incurred by or in consequence of the suspension or discontinuance of the work as herein specified, the following prices, to wit:

For making test borings, *included* the furnishing of all labor, materials, and appliances necessary to do the work:

457 ITEM 1. For the first 4,000 linear feet, aggregate depth of vertical holes, the sum of Eleven and 25/100 dollars ($11 25/100) per linear foot.

ITEM 2. For vertical borings in excess of 4,000 linear feet, aggregate depth of holes, the sum of Nine 75/100 dollars ($9 75/100) per linear foot.

ITEM 3. For inclined borings the sum of Seven 75/100 dollars ($7 75/100) per linear foot.

ART. XXI. In order to assist the Contractor to prosecute the work advantageously, the Engineer shall, from time to time, as the work progresses, but not oftener than once a month, on or about the last day of the month, make in writing an estimate, such as in his opinion shall be just and fair, of the amount and value of the work done and materials furnished by the Contractor in the performance of this contract. The first such estimate shall be of the amount and value of the work and materials furnished since the Contractor commenced the performance of this contract on his part, and every subsequent estimate, except the final estimate, shall be of the amount and value of work done and materials furnished since the last preceding estimate was made, provided, however, that no such estimate shall be required to be made when, in the judgment of the Engineer, the total value of the work done and materials furnished since the last preceding estimate amounts to less than five hundred dollars ($500). Such estimates shall not be required to be made by strict measurement, but they may be approximate only.

Upon each such estimate being made and certified in writing to the Board, The City shall pay to the Contractor ninety per cent.

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of the amount stated in such estimate or certificate to be the
458 value of the work done and materials furnished; provided, however, that The City may at all times reserve and retain out of such partial payments, or any of them, any sum or all sums as by the terms hereof, or of any Law of the State of New York, or any ordinance of The City of New York passed prior to the date hereof, it is or may be authorized to reserve or retain.

Payments may at any time be withheld if the work is not proceeding in accordance with this contract, or if in the judgment of the Engineer the Contractor is not complying with the requirements of the contract and specifications.

ART. XXII. Whenever in the opinion of the Engineer the Contractor shall have completely performed this contract on his part, the Engineer shall so certify in writing, to the Board, and in his certificate shall state, from actual measurements, the whole amount of work done by the Contractor, and also the value of such work under and according to the terms of this contract. On the expiration of forty days after the completion of all the work herein agreed to be done by the Contractor, and the filing of a certificate of the completion and acceptance of the work, made by the Chief Engineer and the Board, in the office of the Comptroller, The City shall pay to the Contractor, in cash, the amount remaining after deducting from the amount or value stated in the last-mentioned certificate, all such sums as shall theretofore have been paid to the Contractor under any of the provisions of this contract, and also any sum or all such sums of money as by the terms hereof The City is or may be authorized to reserve or retain; provided that nothing herein contained shall be construed to affect the right hereby
459 reserved of the Board to reject the whole or any portion of the aforesaid work, should the said certificate be found or known to be inconsistent with the terms of this agreement, or otherwise improperly given. All prior certificates upon which partial payments may have been made, being merely estimates, shall be subject to correction in the final certificate, which final certificate may be made without notice thereof to the Contractor, or of the measurements upon which it is based.

ART. XXIII. The City shall not, nor shall any department or officer thereof, be precluded or estopped by any return or certificate made or given by the Board, any engineer, or other officer, agent or appointee of The City under any provision of this contract, from at any time either before or after the final completion and acceptance of the work and payment therefor pursuant to any such return or certificate, showing the true and correct amount and character of the work done and materials furnished by the Contractor or any other person under this agreement, or from showing at any time that any such return or certificate is untrue and incorrect or improperly made in any particular, or that the work or any part thereof, does not, in fact, conform to the specifications; and The City shall not be precluded or estopped, notwithstanding any such return or certificate and payment in accordance therewith, from demanding and recovering from the Contractor such damages as it may sustain by reason of his failure to comply with the specifications.

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ART. XXIV. Neither the acceptance by the Board, or its Engineer, or any of its employees, nor any order, measurement
460 or certificate by the Engineer, nor any order by the Board for the payment of money, nor any payment for, nor acceptance of the whole or any part of the work by the Engineer or the Board, nor any extension of time, nor any possession taken by the Board or its employees, shall operate as a waiver of any portion of this contract or of any power herein reserved to the Board, or any right to damages herein provided; nor shall any waiver of any breach of this contract be held to be a waiver of any other or subsequent breach.

ART. XXV. No person or corporation other than the signer of this contract as Contractor now has any interest hereunder, and no claim shall be made or be filed and neither The City nor the Board, nor any of its agents, shall be liable, or held to pay, any money, except as provided in Articles XIII., XVII., XIX., XX., XXI. and XXII. The acceptance by the Contractor of the last payment aforesaid shall operate as, and shall be a release to, The City, the Board and each of them and their agents, from all claim and liability to the Contractor for anything done or furnished for, or relating to, the work, or for any act or neglect of The City or of any person relating to or affecting the work, except the claim against The City for the remainder, if any there be, of the amounts kept or retained as provided in Article XIX.

The Contractor shall not demand nor be entitled to receive payment for the work, or any portion thereof, except in the manner set forth in this contract; nor unless each and every one of the promises, agreements, stipulations, terms and conditions herein contained to be performed, kept, observed and fulfilled on the part
461 of the Contractor, shall have been so far forth, performed, kept, observed and fulfilled; and the Engineer shall have given his certificate to that effect, and the Board shall have accepted the work.

ART. XXVI. This contract shall not be binding or of any force unless the Comptroller of The City shall endorse hereon his certificate that there remains unexpended and unapplied, as provided in The Greater New York Charter, a balance of the appropriation or fund applicable thereto sufficient to pay the estimated expense of performing and completing the work required by this contract, as certified by the officers making the same.

ART. XXVII. The address given in the bid or proposal upon which this contract is founded is hereby designated as the place where all notices, letters and other communications to the Contractor shall be certified, mailed or delivered. The delivering at the above-named place or depositing in a postpaid wrapper directed to the above place, in any post-office box regularly maintained by the post-office, of any notice, letter or other communication to the Contractor, shall be deemed sufficient service thereof upon the Contractor. Such address may be changed at any time by an instrument in writing executed and acknowledged by the Contractor and delivered to the Board. Nothing herein contained shall be deemed to

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preclude or render inoperative the service of any notice, letter or other communication upon the Contractor personally.

In witness whereof, this contract has been executed in triplicate for The City of New York by its Board of Water Supply under and by a resolution duly adopted by the said Board, and the
462 seal of the said Board has been hereto affixed; and the Contractor has hereto set his hand and seal, the day and year first above written.

J. EDWARD SIMMONS,
CHARLES N. CHADWICK,
CHARLES A. SHAW,
[SEAL.] *Board of Water Supply.*
AMERICAN DIAMOND ROCK DRILL CO.,
Contractor.
[SEAL.] C. H. TOMPKINS, *President.*

Attest:
V. C. TOMPKINS, *Secretary.*

STATE OF NEW YORK,
County of New York, ss:

On this first day of March, 1906, at The City of New York, in said County, before me personally appeared J. Edward Simmons, Charles N. Chadwick, Charles A. Shaw, to me known, and known to me to be the members of the Board of Water Supply of The City of New York, the persons described in and who executed the foregoing instrument and they severally acknowledged to me that they executed the same for the purposes therein mentioned.

CHAS. E. MARR,
Commissioner of Deeds, New York County.

463 STATE OF NEW YORK,
County of New York, ss:

On this — day of —— 1906, before me personally came —— —— —— —— —— to me known and known to me to be the same person- described in and who executed the foregoing instrument, and -he- acknowledged to me that -he- executed the same for the purposes therein mentioned.

——— ———,
Commissioner of Deeds, The City of New York, or Notary Public, County of ——.

STATE OF NEW YORK,
County of New York, ss:

On this 1st day of March, 1906, before me personally came C. H. Tompkins, to me known and known to me to be the President of the American Diamond Rock Drill Company, and V. C. Tompkins, to me known and known to me to be the Secretary of the American Diamond Rock Drill Company, being by me severally duly sworn, did say, each for himself as follows:

The said C. H. Tompkins, that he was President of said Company,

and the said V. C. Tompkins that he was Secretary of said Company; that he knew the corporate seal of said Company; that the seal affixed to the foregoing instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said Company, and that by like order he thereto signed his name and official designation.

M. J. MULRENAN,
Commissioner of Deeds, The City of New York.

464 *Bond for Performance of Contract.*

Know all Men by these Presents, that we American Diamond Rock Drill Company as Principal, and The Metropolitan Surety Company as Surety, of The City of New York, are held and firmly bound unto The City of New York, in the sum of Three thousand dollars ($3,000), lawful money of the United States of America, to be paid to The City of New York, or to its certain attorney, successors or assigns, for which payment, well and truly to be made, we bind ourselves, our successors and our several and respective heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals. Dated this 1st day of March, on- thousand nine hundred and six.

Whereas, The above bounden, American Diamond Rock Drill Company, by an instrument in writing, under its seal, and duly attested, bearing even date with these presents, has contracted with The City of New York to make test borings in the channel and along the shores of the Hudson river, near the village of New Hamburg, Dutchess County, New York, as by the said instrument will more fully appear;

Now, therefore, the condition of the above obligation is such, that if the said American Diamond Rock Drill Company shall well and truly, and in a good, sufficient and workmanlike manner, perform the said contract, and each and every provision therein contained on its part to be done and performed, and complete the same in accordance with the terms and provisions therein stipulated, and in each and every respect comply with the conditions therein con-
465 tained, then this obligation shall be void, otherwise it shall remain in full force and virtue.

AMERICAN DIAMOND ROCK DRILL CO., [L. S.]
[SEAL.] C. H. TOMPKINS,
President. [L. S.]

Attest:
V. C. TOMPKINS,
Secretary. [L. S.]

THE METROPOLITAN SURETY COMPANY. [L. S.]
[SEAL.] By JOHN J. CAULLET,
President. [L. S.]

Attest:
FRANK A. CONDON,
Secretary. [L. S.]

STATE OF NEW YORK,
County of New York, ss:

I, —— ——, of The City of New York, being duly sworn, do depose and say that I am a — holder in The City of New York and reside at Number — —— Street, in said The City, and that I am worth the sum of — dollars ($—) over and above all my debts of every nature, over and above my liabilities as bail, surety or otherwise, and over and above all my property which is exempt by law from execution.

—— ——.

Subscribed and sworn to before me this — day of —— 1906.

—— ——,
Commissioner of Deeds, The City of New York, or Notary Public, County of ——.

466 STATE OF NEW YORK,
County of New York, ss:

I, —— ——, of The City of New York, being duly sworn, do depose and say that I am a — holder in The City of New York and reside at Number — — Street, in said The City, and that I am worth the sum of — dollars ($—), over and above all my debts of every nature, over and above my liabilities as bail, surety or otherwise, and over and above all my property which is exempt by law from execution.

—— ——.

Subscribed and sworn to before me this — day of —— 1906.

—— ——,
Commissioner of Deeds, The City of New York, or Notary Public, County of ——.

Article III.

Powers of Officers.

SECTION 1. President—The President shall have power to employ and discharge all clerks, employees and agents, subject, however, to the right of the Board of Directors to direct, by a majority vote, the employment of any agent or other employee, or the dismissal of any agent or employee. The President shall also preside at all meetings of the Company or meetings of the Stockholders of the Company and of the Board of Directors, and shall perform such other duties as he may be directed to perform by the Board of Directors, and shall have the general management of the business and affairs of the Company.

SECTION 2. Vice-President—The Vice-President shall, in
467 the absence of the President, preside at all meetings, and shall, when specially authorized thereto, in writing by the President, or, a resolution of the Board of Directors, and not other-

wise, perform such other duties of the President as may be delegated to him.

SECTION 3. Treasurer—The Treasurer shall deposit the money and securities belonging to this Company in such bank or banks or Trust Companies as may be selected by the Board of Directors, and all checks or other orders for the payment of money or the delivery of securities belonging to this Company shall be signed by the President and Treasurer. The Treasurer shall also sign all certificates of stock signed by the President, refer such books of account as the Directors or a majority of them may direct, and perform such other duties as the Board of Directors may require.

SECTION 4. Secretary—The Secretary shall keep a stock book of the form prescribed by law. The Secretary shall also have charge of the certificate book and be the transfer agent of the Company for the transfer of all certificates of stock. He shall also keep the seal of the Company and affix the same to all certificates of stock and such other instruments requiring the seal as may be directed by the Board of Directors. The Secretary shall also keep the minutes of the Board of Directors and the minutes of the meetings of the stockholders, attend to such correspondence as may be assigned to him, and perform such other duties as may be required by the Board of Directors.

SECTION 5. The offices of Secretary and Treasurer may be combined in one person.

468 I hereby certify that the above is a true extract from the By-Laws of the American Diamond Rock Drill Co.

New York, March 28/06.

V. C. TOMPKINS, *Secretary.*

STATE OF NEW YORK,
County of New York, ss:

On the 1st day of March, in the year 1906, before me personally came John J. Caullet, to me known, who, being by me duly sworn, did depose and say that he resided in the City of New York, that he was President of The Metropolitan Surety Company, the corporation described in and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order. And the said John J. Caullet further said that he was acquainted with Frank A. Condon, and knew him to be the Secretary of said Company; that the signature of the said Frank A. Condon subscribed to the within instrument was in the genuine handwriting of said Frank A. Condon, and was subscribed thereto by like order of said Board of Directors, and in presence of him, the said John J. Caullet.

M. J. MULRENAN,
Commissioner of Deeds, New York City.

POOR COPY

469 *Statement of the Metropolitan Surety Company.*

Home Office: 38 Park Row, New York City.

At the Close of Business, December 30, 1905.

(Commenced business April 1, 1905.)

Assets.

N. Y. City Corporate Stock and Bonds	$272,443.75
Cash in Banks and Home Office	390,738.36
Premiums in Course of Collection	39,147.56
Furniture and fixtures	5,144.21
Interest due and accrued on Bond and Stock	2,579.18
	$710,053.06

Liabilities.

Capital Stock Paid in Cash		$500,000.00
Trust Funds		4,382.89
Premium Reserve (as required by law)	$60,958.16	
Surplus and Undivided Profits	144,712.01	
		$205,670.17
		$710,053.06

STATE OF NEW YORK,
County of New York, ss:

Frank A. Condon, being duly sworn, says: that he is the Secretary of The Metropolitan Surety Company, and that to the best of his knowledge and belief, the foregoing is a true and correct statement of the financial condition of said Company, as of December 30, 1905.

FRANK A. CONDON.

470 Subscribed and sworn to before me this 1st day of March, 1906.

[SEAL.] M. J. MULRENAN,
Commissioner of Deeds, New York City.

Attach bond of surety company here.

Certificate of Board of Water Supply as to Award of Contract.

We, the undersigned Commissioners of the Board of Water Supply, appointed to carry out the provisions of Chapter 724 of the Laws of 1905, of the State of New York, hereby certify that the acceptance of this contract will, in our judgment, best secure the

public interests and the efficient performance of the work therein mentioned.

J. EDWARD SIMMONS,
CHARLES N. CHADWICK,
CHARLES A. SHAW,
Board of Water Supply.

Office of the Board of Water Supply, No. 299 Broadway, The City of New York.
Dated, The City of New York, March 1st, 1906.

Funds.

Certificate of the Board of Water Supply as to the Amount to be Expended.

The Board of Water Supply, appointed to carry out the provisions of Chapter 724 of the Laws of 1905 of the State of New York, hereby certifies that the estimated amount to be expended under the contract for making test borings in the channel and along the shores of the Hudson river, near the Village of New Ham-
471 burg, Dutchess County, New York, and executed with American Diamond Rock Drill Company on the first day of March, 1906, is Seventy-nine thousand Seven hundred and seventy-five dollars ($79,775).
Dated, The City of New York, March 1st, 1906.
Chargeable to New York Water Supply for the City of New York, Chap. 724, Laws of 1905.

J. EDWARD SIMMONS,
CHARLES N. CHADWICK,
CHARLES A. SHAW,
Board of Water Supply.

Comptroller's Certificate.

In pursuance of the provisions of Section 149 of The Greater New York Charter, hereby I certify that there remains unapplied and unexpended a balance of the appropriation or fund applicable to this contract sufficient to pay the estimated expense of executing the same, viz. — dollars, ($—).

——— ———,
Comptroller.

Dated, the City of New York, — 1906.

(Copy.)
Received Mch. 30/06.
Answered ——— — ———.

City of New York,
Department of Finance,
Comptroller's Office.

Herman A. Metz, Comptroller.

MARCH 28, 1906.

Commissioners, Board of Water Supply,

SIRS: Please note that the Comptroller's certificate has been endorsed upon March 1, '06, Contract of American Diamond
472 Rock Drill Co., for Test Borings at New Hamburg, this date and it is now a valid contract.

By order of the Comptroller.

(Sgd.) J. H. M'COOEY,
Deputy Comptroller.

The above is a true copy of the or-ginal on file in this office.
BOARD OF WATER SUPPLY,
Per THOS. HASSETT, *Secretary.*

Specifications.

SECTION 1. The test borings are to be made in the channel and along the shores of the Hudson river near the Village of New Hamburg, at the locations to be fixed by the Engineer, but shall not be more than 4 miles up nor more than 4 miles down the river from said village. It is expected that most of the borings will be made in the channel of the Hudson river. The Contractor may be required, however, to make some borings along the shores of said river, and in the tributary streams within the limits hereinbefore mentioned.

SEC. 2. The purpose of these borings is to ascertain the character of the materials passed through, or penetrated, especially the character of the bed rock.

SEC. 3. Borings shall be started and continued with casing or casings of such size as will penetrate all materials of whatever character which overlie the bed rock. When the rock shall be encountered, a drill shall be used which will furnish a core of the rock not less than one inch in diameter.

473 SEC. 4. Most of the holes will be vertical, but the Contractor may be required to bore certain holes along the shores of the river, not to exceed six in number, at an inclination from the vertical not less than 45 degrees nor greater than 80 degrees. The inclination at which each hole is to be bored shall be determined by the Engineer.

SEC. 5. The borings shall go to and into bed rock, and the total depth of any boring, if required by the Engineer, measured from the surface of the water in case of the river and stream borings or from the surface of the ground in case of the land borings, shall be 400 feet for vertical holes or 1,500 feet for inclined holes.

SEC. 6. The number of borings to be made and their depths will

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depend on the results of the work as it progresses. The total aggregate depth for which payment is to be made under this contract, however, shall not be less than 4,000 linear feet. The Engineer may order the work stopped at any time after the completion of borings aggregating 4,000 linear feet in depth, in which case no further work shall be done under this contract.

SEC. 7. Borings shall be made at locations to be designated by the Engineer. The Contractor shall give the Engineer the assistance necessary to fix the locations, and devise and adopt means of maintaining the correct locations when once established. He shall do the work under the supervision, and to the entire satisfaction of the Engineer.

SEC. 8. An accurate record shall be kept of all materials penetrated as well as of the depth of each boring. Samples of the materials penetrated shall be taken in the manner directed by the En-
474 gineer, as frequently as directed by him, and preserved in receptacles furnished by the Board. These receptacles shall be numbered and marked, so as to be readily identified, and shall be delivered by the Contractor at such place or places as the Engineer may direct. The cores of rock shall be carefully handled so that they will not be destroyed or injured. Should it prove impracticable at any depth of the rock to adbtain a core, or should a seam be encountered, particular care shall be taken to get accurate samples of the materials penetrated and the correct measurement of the depth for which no core is gotten.

Every facility and assistance shall be given the Engineer to note and obtain knowledge of each and every occurrence in the process of boring which will help to determine the character, or change in the character of the rock or other material penetrated.

SEC. 9. Ample opportunities and facilities shall be given the Engineer for correctly determining the depth of each boring, and the Contractor shall not remove the pipes or apparatus or do anything to render it difficult or impracticable for the Engineer to determine satisfactorily the depth to which each hole has been sunk and the character of the material passed through or penetrated. Should the pipes or apparatus be removed or should the hole be abandoned without the permission of the Engineer, or during his absence, or before the location of the hole and its depth shall be determined by him, no payment shall be made for it.

SEC. 10. The Board shall furnish the necessary permits from the United States Government for doing the work and, if such are required, permits from the local authorities. The Contractor
475 shall comply with the requirements of these permits and observe all United States Government and local regulations and ordinances bearing on the work and assume all responsibility for failure to do so.

SEC. 11. On the completion and measurement of each and every boring, the Contractor shall promptly remove all plant, boats, piles, staging or other material that may have been used by him in connection with the work. In the case of a boring made on land the

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Contractor shall leave the premises in a condition satisfactory to the Engineer.

SEC. 12. The depth of each boring for which payment is to be made under this contract shall be determined by the Engineer, in case of the river or stream borings, by measurement from the elevation of mean high water to the bottom of the completed hole, and in case of the land borings, from the top surface of the soil or earth to the bottom of the completed hole. The elevation of mean high water shall be determined by the Engineer. The depths of inclined holes shall be measured along their axes.

PLAINTIFF'S EXHIBIT 5.

Know all men by these presents, That The American Diamond Rock Drill Company, a corporation of 95 & 97 Liberty Street, New York City, State of New York, for value received, have sold, and by these presents do grant, assign and convey unto The Phœnix Construction Company, a corporation, of No. 41 Park Row, New York City, all moneys due or to grow due under a certain contract dated March 1, 1906, made between the Board of Water Supply, and the American Diamond Rock Drill Company, for mak-
476 ing test borings in the channel and along the shores of the Hudson River, near the village of New Hamburg, Dutchess Co., N. Y., at the estimated cost of $79,775.00, and all moneys due or to grow due under said contract as amended by agreement of May 13, 1907, and said contract as it may be hereafter amended.

To have and to hold the same unto the said Phœnix Construction Company, its successors and assigns forever, to and for the use of said Phœnix Construction Company hereby constituting and appointing said Phœnix Construction Company true and lawful attorney irrevocable in our name, place and stead, for the purposes aforesaid, to ask, demand, sue for, attach, levy, recover and receive all such sum and sums of money which now are, or may hereafter become due, owing and payable for, or on account of all or any of the accounts, dues, debts, and demands above assigned — giving and granting unto the said attorney, full power and authority to do and perform all and every act and thing whatsoever requisite and necessary, as fully, to all intents and purposes, as we might or could do, if personally present with full power of substitution and revocation, hereby ratifying and confirming all that the said attorney or its substitutes shall lawfully do, or cause to be done by virtue thereof.

In witness whereof, we have hereunto set our hand and seal the 30th day of August, one thousand nine hundred and seven.

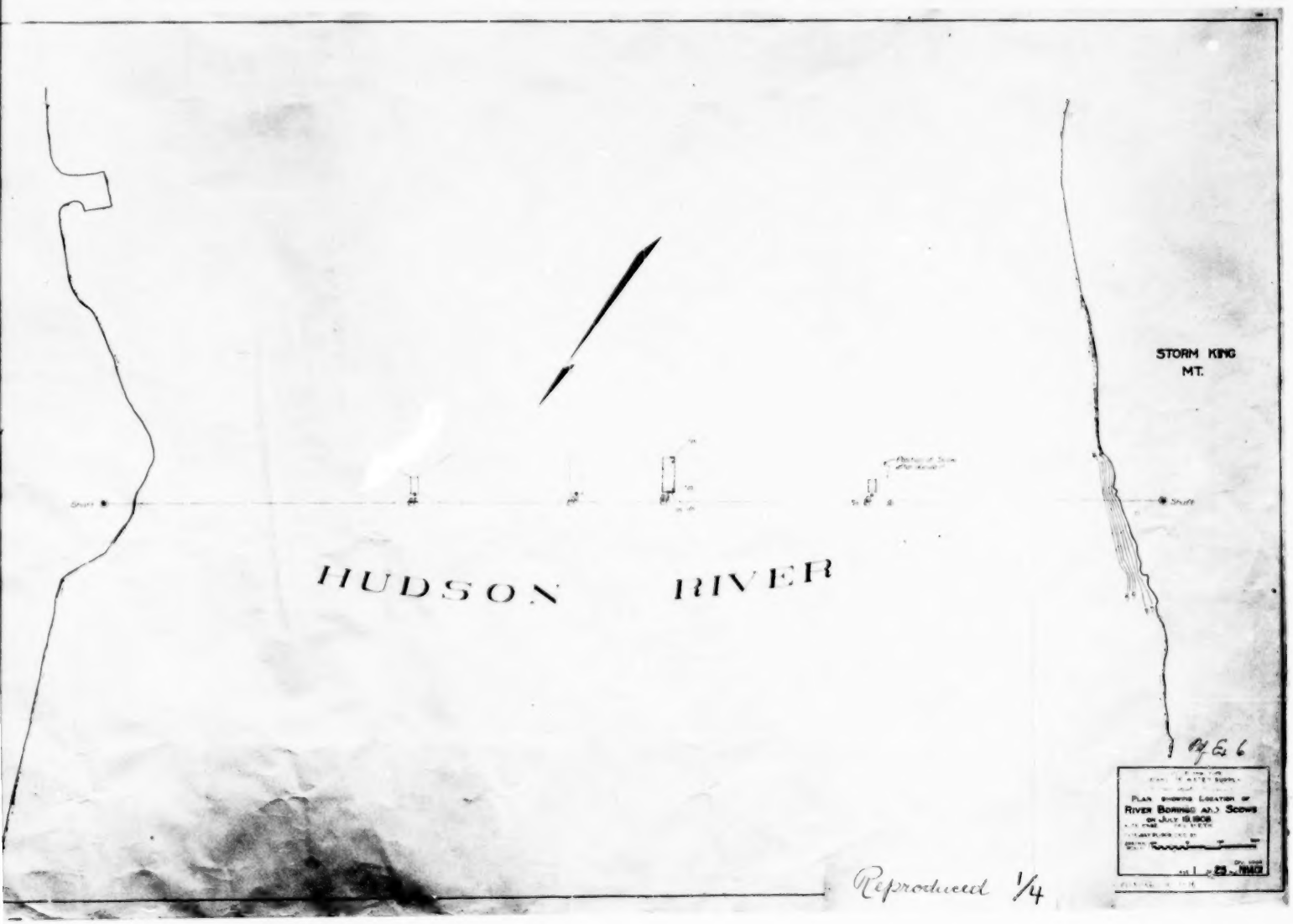
Sealed and delivered in the presence of

AMERICAN DIAMOND ROCK DRILL CO.

V. C. TOMPKINS, *Sec'y & Treas.*

JAMES J. KILDUFF.

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477 STATE OF NEW YORK,
County of New York, ss:

On this 30th day of August, 1907, before me personally came V. C. Tompkins to me known who being duly sworn did depose and say that he resided in Westfield, N. J., that he is Secretary and Treasurer of the American Diamond Rock Drill Co. of New York, the corporation described in and which executed the foregoing instrument, that he knew the seal of said corporation, that the seal attached to said instrument was such corporate seal, that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

[SEAL.] S. B. ROGERS,
Notary Public, Westchester Co.

Certificate Filed in New York Co.

(Here follows Exhibit 6, marked page 477½.)

There was no Plaintiff's Exhibit No. 8.

PLAINTIFF'S EXHIBIT 9.

Agreement made this 12th day of May, 1907, between the City of New York, acting by and through the Board of Water Supply, by virtue of the power conferred by Chapter 724, Laws of 1905, and the Acts amendatory thereof and supplemental thereto (hereinafter designated as The Board), and the American Diamond Rock Drill Company, a corporation duly organized and existing under and by virtue of the laws of the State of —— (hereinafter designated as the Contractor).

478 Witnesseth as follows:

Whereas, the parties hereto on or about March 1, 1906, entered into a formal contract in writing, under which the Contractor undertook to do for the Board certain survey work known as "Test Borings" in the channel and along the shores of the Hudson River, near the Village of New Hamburg, Dutchess County, New York, but not more than four miles up, nor more than four miles down, the river from said village; and

Whereas, in Section 5 of the Specifications of said contract it was provided that, "the total depth of any boring, if required by the Engineer, measured from the surface of the water in case of the river and stream borings or from the surface of the ground in case of the land borings shall be 400 feet for vertical holes"; and

Whereas the Contractor duly gave and filed its bond with the Metropolitan Surety Company as surety conditioned for the performance of said Contract by the Contractor in a good, sufficient and workmanlike manner; and

Whereas both the Board and the Contractor desire to modify said contract in certain particulars as hereinafter more fully set forth, so that said survey work may be carried on at or near Storm King, in the channel and along the shores of said river, and to a greater depth than 400 feet; and

Whereas said Metropolitan Surety Company, the surety on said bond, has consented in writing under its corporate seal to such modification and to the execution of this agreement, and has agreed

479 that said bond shall be conditioned for the performance of said contract as so modified, with the same force and effect as if said bond had been originally so drawn and executed, and as if said contract had been originally drawn and executed as so modified.

Now, the parties hereto, each in consideration of the undertaking, promises and agreements on the part of the other herein contained, have undertaken, promised and agreed and do hereby undertake, promise and agree, The City for itself, its successors and assigns, and the Contractor for itself, its successors and assigns, as follows:

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Article I.

The Contractor shall make test borings, including the furnishing of all labor, materials and appliances necessary to do the work, in all respects in accordance with said contract dated March 1st, 1906, as modified by this agreement, at or near Storm King in the channel and along the shores of the Hudson River.

Article II.

The Contractor shall carry any vertical hole to a greater depth than 400 feet, if and when required by the Engineer.

Article III.

The City shall pay the Contractor for the aggregate depth of the three holes already bored at or near Little Stony Point at the prices specified in said contract for vertical holes and work shall be discontinued at that locality.

480 Article IV.

If a depth of four hundred (400) feet shall be reached in any vertical or inclined hole bored in the bed of the river, The City shall pay the Contractor therefor at the price specified in said contract, no matter what may become of the hole thereafter. For any depth of any vertical or inclined hole bored in the bed of the river beyond four hundred (400) feet, The City shall pay the Contractor the said specified price, and in addition the sum of Thirteen dollars ($13.00) per lineal foot, provided, however, that, if any hole shall be lost on account of the gross carelessness of the Contractor, or its agents or employees, The City shall pay the Contractor for the first four hundred (400) feet only actually bored.

Article V.

It appearing that the material through which the inclined holes at or near Breakneck will pass is granite and not slate or limestone, the Contractor shall not be required to bore six (6) fifteen hundred (1500) foot inclined holes as required by Section 4 of said specifications, but the Contractor shall bore one inclined hole at Storm King to a depth of six hundred (600) feet if required by the Engineer, and if said hole shall run out of rock at a depth not exceeding four hundred (400) feet, the Contractor shall, if required by the Engineer, bore another inclined hole, in the same vicinity at an angle between said hole and the vertical to a depth not exceeding six hundred (600) feet.

481 Article VI.

The City shall pay the Contractor, and the Contractor shall accept in full payment, for all vertical land holes, no matter when

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the same may be commenced or completed, the sum of Six dollars and fifty cents ($6.50) per lineal foot, in the place and stead of the sums or prices specified in said contract therefor.

Article VII.

The Contractor shall have the right to bore seventy-five feet into rock in any hole in which rock is encountered.

Article VIII.

The City shall pay the Contractor for the depth beyond four hundred (400) feet in river hole No. 10 on the Storm King line at the rates specified in Article IV of this agreement, and with respect to said hole, the Contractor shall have the right granted by Article VII of this agreement.

Article IX.

All the work under said contract of March 1, 1906, as modified by this agreement, shall be completed on or before October 1, 1907.

Article X.

In all respects, except as modified by this agreement, said contract of March 1st, 1906, shall be deemed to be and shall be in full force and effect.

In witness whereof, this agreement has been executed in triplicate for the City by the Board under and by virtue of a reso-
482 lution adopted by the Board, and the seal of the Board has been hereto affixed by the like authority, and the Contractor has hereto caused its corporate name to be signed and its seal to be affixed by its duly authorized representative, all on the day and year first above written.

(Sgd.) J. EDWARD SIMMONS,
(Sgd.) CHARLES N. CHADWICK,
(Sgd.) CHARLES A. SHAW,
As Commissioners of the Board of Water Supply of The City of New York.

AMERICAN DIAMOND ROCK DRILL CO., *Contractor.*
(Sgd.) By C. H. TOMPKINS, *Pres'd't.*

Attest:
(Sgd.) V. C. TOMPKINS,
Sec'y & Treas.

Approved as to form:
(Sgd.) JOHN L. O'BRIEN,
Ass't Corporation Counsel.

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STATE OF NEW YORK,
County of New York, ss:

On this 16th day of May, 1907, at the City of New York, in said County and State, before me personally came J. Edward Simmons, Charles N. Chadwick and Charles A. Shaw, to me personally known and known to me to be the Commissioners of the Board of Water Supply of the City of New York, and the same persons described in and who executed the foregoing agreement as such Commissioners, and they severally acknowledged to me that they executed
483 the same as such Commissioners for the purposes therein mentioned.

(Sgd.) CHAS. E. MARR,
Commissioner of Deeds, City of New York.

STATE OF NEW YORK,
County of New York, ss:

On this 15th day of May, 1907, before me personally came C. H. Tompkins to me known and known to me to be the President of the American Diamond Rock Drill Company, the corporation described in and which executed the foregoing agreement, and V. C. Tompkins to me personally known and known to me to be the Secretary of said Company, who being by me duly and severally sworn, deposed and said, each for himself, as follows: The said C. R. Tompkins that he was President of said Company and the said V. C. Tompkins that he was the Secretary thereof; that he knew the corporate seal of said Company; that the seal affixed to the foregoing agreement was such corporate seal and was thereto affixed by order of the Board of Directors of said Company; and that by like order he signed his name and official designation thereto.

(Sgd.) CHAS. E. MAAR,
Commissioner of Deeds, City of New York.

Consent of Surety.

Modification of Contract No. 1.

The Metropolitan Surety Company, the surety upon the bond of the American Diamond Rock Drill Company, dated March 1, 1906, conditioned for the performance in a good, sufficient and
484 workmanlike manner of the contract to which said bond is attached, dated March 1, 1906, between The City of New York, acting through the Board of Water Supply, and said American Diamond Rock Drill Company for borings in the channel and along the shores of the Hudson River, does hereby consent that said contract may be modified by the parties thereto in the particulars set forth in the annexed modification agreement, which is hereby made a part of this consent, so that the borings and work provided for by said contract may be carried on at or near Storm King and below the four hundred (400) foot level; and said Met-

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ropolitan Surety Company does also hereby consent that said bond shall be deemed to be and shall be conditioned for the performance of said contract as so modified, with the same force and effect as if said bond had been originally drawn and executed as so modified.

In Witness whereof, the said Metropolitan Surety Company has hereunto caused its corporate seal to be affixed and its corporate name to be subscribed this 8th day of May, 1907.

METROPOLITAN SURETY COMPANY,
(Sgd.) By M. JOSEPH McCLOSKEY, *Vice-President.*

Attest:
(Sgd.) WALTER C. McCLURE, *Secretary.*

Approved as to form.
(Sgd.) JOHN L. O'BRIEN,
Ass't Corporation Counsel.

485 Attached hereto is the certificate of acknowledgment of The Metropolitan Surety Company.

PLAINTIFF'S EXHIBIT 10.

Second Agreement of Modification to Contract No. 1 for Test Borings in the Channel and Along the Shores of the Hudson River at or Near Storm King.

Agreement made and entered into this 27th day of September, 1907, by and between The City of New York, acting by and through the Board of Water Supply, by virtue of the power vested in it by Chapter 724 of the Laws of 1905 as amended by Chapter 314 of the Laws of 1906, of the State of New York, party of the first part, and American Diamond Rock Drill Company of the City, County and State of New York, hereinafter designated the Contractor, party of the second part:—

Whereas the parties hereto have heretofore on or about the first day of March, 1906, duly made and entered into a certain contract in writing, which contract bears the Board number 1, and which contract was modified by an agreement of modification made and entered into by the parties hereto on or about the 13th day
486 of May, 1907, for making test borings in the channel and along the shores of the Hudson River at or near Storm King, in Orange County, New York, and

Whereas both parties hereto desire to further modify and amend said contract No. 1, in certain particulars hereinafter more fully set forth;

Now, therefore, this agreement Witnesseth: that the parties hereto each in consideration of the undertakings, promises and agreements, on the part of the other, and herein contained, have undertaken, promised and agreed, and do hereby undertake, promise and agree, the party of the first part for itself, its successors and assigns, and

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the party of the second part for itself, its successors and assigns, as follows:—

ART. I. That Art. VI of said contract be and the same hereby is modified so that the time in which the Contractor shall complete the work required under this contract as amended, is extended to January 1, 1908.

ART. II. That Art. XX of said contract be and the same hereby is modified so as to include the following:

For payment under Sections 13, 14 and 15.

Item 4. For the first 225 feet in depth below surface of water, the sum of fifteen dollars ($15.00) per lineal foot.

Item 5. For each foot in depth from 226 to 325 feet, both inclusive, below surface of water, the sum of twenty dollars ($20.00) per lineal foot.

Item 6. For each foot in depth from 326 to 425 feet, both inclusive, below surface of water, the sum of twenty-five dollars
487 ($25.00) per lineal foot.

Item 7. For each foot in depth from 426 to 525 feet, both inclusive, below surface of water, the sum of thirty dollars ($30.00) per lineal foot.

Item 8. For each foot in depth from 526 to 725 feet, both inclusive, below surface of water, the sum of thirty-five dollars ($35.00) per lineal foot.

Item 9. For each foot in depth from 626 to 725 feet, both inclusive, below surface of water, the sum of forty dollars ($40.00) per lineal foot.

Item 10. For each foot in depth over 725 feet below surface of water, the sum of fifty dollars ($50.00) per lineal foot.

ART. III. The provision of Art. VII, of the agreement of modification, dated May 13, 1907, shall not apply to work done under this agreement.

ART. IV. Except as herein modified and as modified by agreement dated May 13, 1907, the said Contract No. 1 shall be and the same hereby is in full force and effect.

ART. V. That the specifications of said contract be and the same hereby are modified by adding thereto the following sections:

SECT. 13. The Contractor shall drill two special vertical holes, each at least 725 feet in depth, at such points in the Hudson River
488 on the crossing line between Storm King and Breakneck, as may be directed by the Engineer. He shall furnish two runs of casing, above ten inches in diameter, which will not bind, the smaller of these runs to telescope over the 10-inch, and the larger to be of sufficient diameter to receive the smaller. The casing shall be continued with pipe successively reduced in size to 10 inches, 8 inches, 6 inches, 4 inches and 2½ inches, inside diameter, or casing of such other sizes as directed by the Engineer, each size of casing being carried to the maximum depth practicable, as determined by the Engineer. Payment under this section shall be at the prices stipulated in Items 4 to 10 of Article XX in this agreement provided.

SECT. 14. In case bed rock shall be encountered, the Contractor

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shall furnish cores for all depths, without any extra compensation therefor.

SECT. 15. Should it prove impracticable, in the opinion of the Engineer, to carry either of said holes to bed rock, the Contractor shall be paid for the actual depth bored, at the prices provided for the respective depths in Art. XX. hereof; except that if a hole shall be lost through the gross carelessness of the Contractor or his employees, no payment shall be made therefor.

489 In Witness Whereof the Commissioners of the Board of Water Supply have hereunto set their hands and seals on behalf of The City, and the Contractor has also hereunto set his hand and seal; and the Board and the Contractor have executed this agreement in triplicate the day and year first above stated.

(Sgd.) J. EDWARD SIMMONS,
President,
(Sgd.) CHARLES N. CHADWICK,
(Sgd.) CHARLES A. SHAW,
[SEAL.] *Commissioners of the Board of Water Supply.*

(Sgd.) AMERICAN DIAMOND ROCK DRILL CO.,
C. H. TOMPKINS, *Pres't.*
V. C. TOMPKINS, *Sect. & Treas.,*
Contractor.

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

On this 28th day of September, 1907, before me personally came J. Edward Simmons, Charles N. Chadwick and Charles A. Shaw to me known and known to me to be the Commissioners of the Board of Water Supply of The City of New York, the persons described in and who executed the foregoing instrument, as said Commissioners, and they severally duly acknowledged to me that they executed the same for the purposes therein mentioned, as such Commissioners.

(Sgd.) GEO. B. PETIT,
Notary Public, Kings Co.

Cert. filed in New York Co.

490 STATE OF NEW YORK,
County of New York, ss:

On this 27th day of September, 1907, before me personally came C. H. Tompkins to me known and known to me to be the President of American Diamond Rock Drill Company, and V. C. Tompkins to me known and known to me to be the Secretary and Treasurer of American Diamond Rock Drill Company, — being by me severally duly sworn, did say, each for himself as follows:

The said C. H. Tompkins that he was President of said Company, and the said V. C. Tompkins that he was Secretary and Treasurer of said Company; that he knew the corporate seal of said Company;

that the seal affixed to the foregoing instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said Company, and that by like order he thereto signed his name and official designation.

(Sgd.) GEO. B. PETIT,
Notary Public, County of Kings.

Cert. filed in New York Co.

Consent of Surety.

Second Modification of Contract No. 1.

The Metropolitan Surety Company, the surety upon the bond of American Diamond Rock Drill Company, dated March 1, 1906, conditioned for the performance in a good, sufficient and workmanlike manner of the contract to which said bond is attached, dated March 1, 1906, between The City of New York, acting through the Board of Water Supply, and said American Diamond Rock Drill
491 Company for borings in the channel and along the shores of the Hudson River, which contract was modified by an Agreement of Modification duly made and entered into by the parties thereto on or about the 13th day of May, 1907, does hereby consent that said contract as modified may be further modified by the parties thereto in the particulars set forth in the annexed modification agreement, which is hereby made a part of this consent so as to provide for the drilling of two special vertical holes with larger casing at least 725 feet in depth; and said Metropolitan Surety Company does also hereby consent that said bond shall be deemed to be and shall be conditioned for the performance of said contract as so further modified, with the same force and effect as if said bond had been originally so drawn and executed and as if said contract had been originally drawn and executed as so further modified.

In Witness Whereof, the said Metropolitan Surety Company has hereunto caused its corporate name to be subscribed and its corporate seal to be affixed this 28th day of September, 1907.

METROPOLITAN SURETY COMPANY,
(Sgd.) By M. JOSEPH McCLOSKEY, *Vice-President.*

Attest:
(Sgd.) M. J. MULRENAN,
[SEAL.] *Assistant Secretary.*

492 PLAINTIFF'S EXHIBIT 11.

We, the American Diamond Rock Drill Company, of the City, County and State of New York, for and in consideration of the sum of One ($1.00) dollar, lawful money of the United States of America, to us in hand paid, the receipt whereof is hereby acknowledged, and of other valuable considerations, do hereby sell, assign, transfer and set over unto the Phœnix Construction Company, likewise of the City, County and State of New York, all that certain

contract between the City of New York, through the Board of Water Supply and us, dated the first day of March, 1906, and modified agreement dated May 13, 1907, and September 27, 1907, for making test borings in the channel and along the shores of the Hudson River, near the village of New Hamburg, Dutchess County, and all its right, title and interest therein.

In Witness Whereof, we have hereunto set our hand and seal this 21st day of February, 1908.

(Signed) AMERICAN DIAMOND ROCK DRILL CO.,

[SEAL.] C. H. TOMPKINS, *Pres't.*

V. C. TOMPKINS, *Sec'y.*

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

I hereby certify that the above is a true copy of the original assignment on file in the office of the Comptroller of the City of New York.

[SEAL.] ARTHUR C. HUTCHESON,
Commissioner of Deeds, City of New York.

Feb. 23, 1910.

493 PLAINTIFF'S EXHIBIT 12.

Preliminary Surveys.—Third Agreement of Modification to Contract No. 1 for Test Borings in the Channel and Along the Shores of the Hudson River at or Near Storm King.

Agreement made and entered into this 11th day of June, in the year 1908, by and between The City of New York, acting by and through the Board of Water Supply, by virtue of the power vested in it by Chapter 724 of the Laws of 1905, of the State of New York, and the amendments thereto, party of the first part, and the Phœnix Construction Company of the City, County and State of New York, hereinafter designated the Contractor, party of the second part.

Whereas the party of the first part hereto on or about the 1st day of March, 1906, duly made and entered into a certain contract in writing, with American Diamond Rock Drill Company of the City, County and State of New York, which contract bears the Board Number "1," and which contract was duly modified by two agreements of modification bearing date May 13, 1907, and September 27, 1907, respectively, for making test borings in the channel and along the shores of the Hudson River, at or near Storm King, in Orange County, New York; and

Whereas said Contract No. 1, modified as aforesaid, as duly assigned by said American Diamond Rock Drill Company to,
494 and duly accepted by, the party of the second part hereto, on or about the 21st day of February, 1908; and

Whereas the parties hereto desire to further modify and amend said Contract No. 1 in certain particulars hereinafter more fully set forth;

Now, Therefore, this agreement Witnesseth that the parties hereto each in consideration of the undertakings, promises and agreements on the part of the other herein contained, have undertaken, promised and agreed, and do hereby undertake, promise and agree, the party of the first part for itself, its successors and assigns, and the party of the second part for itself and its successors, as follows:

Article I. That Art. VI of the said contract be and the same hereby is modified so that the time in which the Contractor shall complete the work required under this contract as amended, is extended to January 1, 1909.

Art. II. Except as herein modified and as modified by the agreements of modification, dated May 13, 1907, and September 27, 1907, said Contract No. 1, shall be and the same hereby is in full force and effect.

Art. III. That the specifications of said contract be and the same hereby are modified by adding thereto the following section:

SECTION 16. The Contractor shall drill one additional special vertical hole to a depth, if practicable, of 1,000 feet, at such point in the Hudson River on the crossing line between Storm King and Breakneck as may be directed by the Eng-neer. He shall,
495 unless otherwise permitted, drill at least 200 feet into bed-rock, if the bed-rock is encountered at any depth greater than 800 feet below mean high water. He shall furnish five runs of full weight wrought-iron casing of greater diameter than 5 inches; two of these runs shall be above 10 inches in diameter and of such size that they will not bind, the smaller to telescope over the 10-inch and the larger to be of sufficient diameter to receive the smaller. Each size of casing shall be carried to the maximum depth practicable as determined by the Engineer, except that the largest size need not be driven to a greater depth than 300 feet. The Engineer may direct the number and sizes of the casings smaller than 6 inches, provided his directions are given to the Contractor at least 30 days before the casing is to be used. Should it prove impracticable, in the opinion of the Engineer, to carry this hole to bed-rock, the Contractor shall be paid for the actual depth bored at the prices hereinafter specified; except that if the hole shall be lost through the gross carelessness of the Contractor, or his employees, no payment shall be made therefor. Payment under this section shall be made at the prices stipulated in Items 4 to 10 inclusive of Article XX of this contract as provided in Art. II of the second agreement of modification dated September 27, 1907.

In Witness Whereof the Commissioners of the Board of Water Supply have hereunto set their hands and have caused the seal of the Board of Water Supply to be affixed on behalf of The City, and the Contractor has hereunto set its hand and seal; and
496 the Board and the Contractor have executed this agreement in triplicate the day and year first above written, one part

to remain with the Board, one to be filed with the Comptroller of The City and the third to be delivered to the Contractor.

THE CITY OF NEW YORK,
By BOARD OF WATER SUPPLY.

(Sgd.) J. A. BENSEL, *President;*
(Sgd.) CHAS. N. CHADWICK,
Commissioners of the Board of Water Supply.

THE PHŒNIX CONSTRUCTION COMPANY,
(Sgd.) WILLIAM F. SHANNON,
President;
(Sgd.) FRANCIS W. BELKNAP, *Sec.,*
Contractor.

Certificate of Acknowledgment of Board.

THE CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

On this 16th day of June, 1908, before me personally came John A. Bensel and Charles N. Chadwick, to me known and known to me to be two of the Commissioners of the Board of Water Supply of The City of New York, the persons described in and who, as such Commissioners, executed the foregoing instrument, and they severally acknowledged to me that they executed the same for the purposes therein mentioned.

497

EDWARD S. BROWNSON, JR.,
Notary Public, 307, *N. Y. C.*

Title.

Certificate of Acknowledgment of Contractor.

CITY OF NEW YORK,
County of New York, ss:

On this 11th day of June, 1908, before me personally came William N. Shannon to me personally known and known to me to be the President of The Phœnix Construction Company, the corporation described in and which executed the foregoing instrument, and Francis W. Belknap to me personally known and known to me to be the Secretary of said corporation, who being by me severally duly sworn did say, each for himself, as follows:

The said William N. Shannon says that he resides at 344 E. 79th Street, New York City and is such President of The Phœnix Construction Company and the said Francis W. Belknap says that he resides at 224 Jamaica Ave., Flushing, L. I., and is such Secretary of The Phœnix Construction Company; I know the corporate seal of said corporation; the seal affixed to the foregoing instrument is such corporate seal and it was so affixed by order of the Board of Directors of said corporation, and by like order I signed thereto my name and official designation.

ARTHUR C. HUTCHESON,
Commissioner of Deeds, New York City.

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498 *Consent of Surety.*

Third Agreement of Modification to Contract No. 1.

For and in consideration of the premises and of one dollar ($1.00) the receipt whereof is hereby acknowledged, The Metropolitan Surety Company, the surety on the bond of American Diamond Rock Drill Company, dated March 1, 1906, conditioned for the performance in a good, sufficient and workmanlike manner, of Contract No. 1, to which the said bond is attached, dated March 1, 1906, between The City of New York acting by and through the Board of Water Supply, and the said American Diamond Rock Drill Company, for test-borings in the channel and along the shores of the Hudson River, which contract was modified by two agreements of modification, bearing date May 13, 1907, and September 27, 1907, respectively, and which contract and bond were duly assigned by said American Diamond Rock Drill Company to, and duly accepted by, The Phœnix Construction Company by instruments in writing, dated February 21, 1908, to which assignment The Metropol-tan Surety Company duly consented by its instrument in writing, dated February 24, 1908, does hereby consent that said contract as modified by the parties thereto in the particulars set forth in the annexed agreement of modification, which is hereby made a part of this consent, so as to provide for the drilling of a second additional special vertical hole, if practicable, 1,000 feet in depth; and said The Metropolitan Surety Company does also consent that said bond shall be deemed and shall be conditioned for the performance of said contract as so further modified, with the same force and effect
499 as if said contract had been originally drawn and executed as so further modified.

In Witness Whereof, The Metropolitan Surety Company has hereunto caused its corporate name to be subscribed and its corporate seal to be affixed this 11th day of June, 1908.

THE METROPOLITAN SURETY COMPANY,
By WALTER C. McCLURE,
Acting Vice-President.

Attest:
E. D. LIVINGSTON,
Attorney in Fact.

Approved as to form:
JOHN L. O'BRIEN,
Acting Corporation Counsel.

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PLAINTIFF'S EXHIBIT 13.

CORNWALL-ON-HUDSON, N. Y., *April 4th*, 1908.

Contract No. 1, Boats.

Cornell Steamboat Company, Foot of 51st Street, New York City, N. Y.

GENTLEMEN: Drilling in the channel of the Hudson River, near Storm King is to be continued this season under permit is-
500 sued by the War Department. It is expected that three pile drivers will be placed in position next week. Attention is called to the fact that the obstructions may be moved from time to time and additional obstructions placed during the season. Signals and lights will be maintained as required by the "Pilot Rules for the Inland Waters of the Atlantic and Pacific Coasts" as approved by the Secretary of Commerce and Labor, February 25th, 1907.

Will you kindly bring this notice to the attention of the officers of your vessels.

Very truly yours,
(Signed) WILLIAM E. SWIFT,
Division Engineer.

NOTE.—I hereby certify that the above is a true copy of the letter sent to the Cornell Steamboat Company.

WILLIAM E. SWIFT,
Notary Public, Orange Co.

Feb. 17-'10.

PLAINTIFF'S EXHIBIT 14.

JULY 18, 1908.

Contract No. 1, Boats.

Cornell Steamboat Company, Foot of 51st Street, New York City, N. Y.

GENTLEMEN: Referring to my letter of April 4th in re-
501 gard to drilling in the channel of the Hudson River, near Storm King, I wish to call your attention to the fact that a fourth scow has just been located between the two westerly obstructions.

All of these scows are located strictly in accordance with the War Department permit.

Very truly yours,
(Signed) WILLIAM E. SWIFT,
Division Engineer.

NOTE.—I hereby certify that the above is a true copy of the letter sent to the Cornell Steamboat Company.

WILLIAM E. SWIFT,
Notary Public, Orange Co.

Feb. 17-'10.

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PLAINTIFF'S EXHIBIT 15.

Notice.

Fog.—In case of fog ring bell rapidly for about five seconds, at intervals of not more than one minute.

Light.—When at anchor the scow shall carry forward where it can best be seen, but at a height not to exceed 20 feet above the hull a white light in a lantern so constructed as to show a clear, uniform and unbroken light, visible all around the horizon at a distance of at least one mile.

502 PLAINTIFF'S EXHIBIT 16.

JULY 31, 1908.

Bill of T. S. Marvel Shipbuilding Company.....$75.73

PLAINTIFF'S EXHIBIT 17.

Bills of Cornell Steamboat Company.

JULY 20, 1908.

Services of Tug Mould.....$20.00

JULY 24, 1908.

Services of Str. Mould.....$6.00

JULY 24, 1908.

Towing from Storm King to Marvel's.....$10.00

JULY 31, 1908.

Towing from Marvel's to Storm King.....$10.00

JULY 31, 1908.

Towing from Storm King to N. Y.....$40.00

JULY 31, 1908.

Towing from Stream to Storm King.....$5.00

AUG. 22, 1908.

Services at Breakneck.....$18.00

AUG. 25, 1908.

Services at Breakneck.....$12.00

PLAINTIFF'S EXHIBIT 18.

Bill of Merritt & Chapman Derrick & Wrecking Co.

AUG. 6, 1908.

To services, etc.....$537.50

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503 PLAINTIFF'S EXHIBIT 19.

Department of Commerce and Labor.

Steamboat Inspection Service.

Office of Supervising Inspector, 2d District.

17 BATTERY PLACE,
NEW YORK, N. Y., *March* 26, 1908.

Notice to Vessels Navigating the Hudson River Near Newburgh.

Referring to the notice issued from this office on May 16, 1906, you will please take notice that the Phœnix Construction Co. is about to engage in the work of drilling the bottom of the Hudson River opposite Storm King Mountain, below Newburgh.

Probably four scows will be employed at first, and more subsequently.

The lights shown will be the same as those on the drill scows used during the last two seasons.

Please advise the masters and pilots in your employ to exercise caution when approaching the location of this work, and especially to remember that the drill scows must frequently change their positions.

Respectfully,

IRA HARRIS,
Supervising Inspector, 2nd District.

504 PLAINTIFF'S EXHIBIT 20.

Department of Commerce and Labor.

Steamboat Inspection Service.

Office of Supervising Inspector, 2d District.

17 BATTERY PLACE,
NEW YORK, N. Y.

Notice to the New York & Albany Board, U. S. Local Inspectors.

GENTLEMEN: The Phœnix Construction Company inform me that they have added an additional drill scow to the outfit near Poughkeepsie, and that it will be lighted the same as the other three, that is there will now be four scows working there, which makes additional caution necessary.

Will you please notify such steamboat lines of your district as pass that point frequently?

Respectfully,

(Signed) IRA HARRIS,
Supervising Inspector, 2nd District.

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505 PLAINTIFF'S EXHIBIT 21.

Department of Commerce and Labor.

Steamboat Inspection Service.

Office of Local Inspectors.

17 BATTERY PLACE,
NEW YORK, N. Y., *July* 18, 1908.

Cornell Steamboat Co., Foot West 51 St., New York City.

GENTLEMEN: We have been informed that the Phœnix Construction Company have an additional drill scow to the outfit near Poughkeepsie and that it will be lighted the same as the other three, that is, there will now be four scows working there, which will make additional caution necessary.

Respectfully,

HENRY M. SEELEY,
J. L. CROWELL,
Local Inspectors.

PLAINTIFF'S EXHIBIT 22.

Pay Roll of Plaintiff Company for Period July 20-Aug. 1, 1908, Giving Names and Wages of Men in Detail and Signed by Them. Also Following Bills:

Bill of J. W. Fout..... $1.00
Bill of Mr. Reynoles, lodgings and meals..... $7.50

JULY 21, 1908.

Bill of Central-Hud. Stbt. Co..... $ .20

506 JULY 21, 1908.

Bill of Central-Hud. Stbt. Co..... $1.50
Bill of P. C. Doherty, supplies..... $ .90

JULY 27, 1908.

Bill of W. L. Smith, supplies..... $2.00

JULY 28, 1908.

Bill of West Shore R. R..... $1.00
Proportion of Pay Roll and expenses ch[illegible] to hole 21..$560.59

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PLAINTIFF'S EXHIBIT 23.

Pay Roll of Plaintiff Company for Period August 17-29, 1908, Giving Names and Wages of Men in Detail and Signed by Them. Also Following Bills:

AUGUST 19, 1908.

Bill of National Express Co..... $ .30

JULY 23, 1908.

Bill of Standard Oil Co..... $23.10

AUG. 8, 1908.

Bill of Henry J. McCoy Co..... $2.50

AUG. 17, 1908.

Bill of West Shore R. R..... $7.25

AUG. 14, 1908.

Bill of Adams Express Co..... $ .25

AUG. 14, 1908.

Bill of National Express Co..... $ .30

507

JULY 24, 1908.

Bill of West Shore R. R..... $ .84

AUG. 28, 1908.

Bill of National Express Co..... $ .35

AUG. 25, 1908.

Bill of Central-Hud. Stbt. Co..... $ .20

AUG. 27, 1908.

Bill of Central-Hud. Stbt. Co..... $ .72

AUG. 28, 1908.

Bill of National Express Co..... $1.00

AUG. 20, 1908.

Bill of Steamboat Emeline ..... $ .15

AUG. 14, 1908.

Bill of W. V. Martin..... $2.72

Proportion of Pay Roll and expenses charged to wreck of hole 21 .....$202.67

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PLAINTIFF'S EXHIBIT 24.

Pay Roll of Plaintiff Company for Period August 30-September 12, 1908, Giving Names and Wages of Men in Detail and Signed by Them. Also Following Bills:

Bill of Geo. E. Porteous $6.00

JULY 13, 1908.

Bill of Lawson Hardware Co..... $2.40

SEPT. 4, 1908.

Bill of West Shore R. R..... $1.12

508 SEPT. 10, 1908.

Bill of Steamboat Emeline..... $ .15

SEPT. 10, 1908.

Bill of Erie R. R..... Paid
Bill of W. L. Post & Son..... $4.25

SEPT. 3, 1908.

Bill of C. W. Bailey..... $5.00
Proportion of Pay Roll and expenses charged to wreck of hole 21 .....$282.46

PLAINTIFF'S EXHIBIT 25.

Pay Roll of Plaintiff Company for Period September 14-26, 1908, Giving Names and Wages of Men in Detail and Signed by Them. Also Following Bills:

SEPT. 14, 1908.

Bill of National Express Co..... $2.72

SEPT. 21, 1908.

Bill of Central-Hud. Stbt. Co..... $ .25

SEPT. 22, 1908.

Bill of Central-Hud. Stbt. Co..... $ .50

SEPT. 24, 1908.

Bill of Central-Hud. Stbt. Co..... $ .25
Proportion of Pay Roll and expenses charged to wreck of hole 21 ..... $82.70

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509 PLAINTIFF'S EXHIBIT 25-A.

United States Engineer Office,

Room F, Army Building, 39 Whitehall St.

NEW YORK CITY, *April* 18, 1908.

The Board of Water Supply, City of New York, 299 Broadway, New York, N. Y.

SIRS: Referring to your letter of April 16, 1908, my understanding agrees with yours that the rules referred to in clause F of your permit of February 24, 1908, are those contained in Form 804 of the Department of Commerce and Labor, entitled "Pilot Rules for the Inland Waters of the Atlantic and Pacific Coasts."

However the Inspector of the Third Light House District is the best judge of the requirements of the clause F.

Very respectfully,

JOHN G. D. KNIGHT,
Colonel, Corps of Engineers, U. S. A.

A true copy:
W. M. BLACK,
Colonel, Corps of Engineers.

510 DEFENDANT'S EXHIBIT 10.

War Department,
Office of the Chief of Engineers.

WASHINGTON, *June* 18, 1909.

Mr. Amos Van Etten, Kingston, New York.

SIR: Pursuant to your personal application at this office, there is sent you herewith a memorandum of action by the Department in the matter of applications from the Board of Water Supply, City of New York, for permission to make borings in the Hudson River in connection with location of the Catskill aqueduct.

By direction of the Chief of Engineers.

Very respectfully,

J. B. CAVANAUGH,
Major, Corps of Engineers.

56908.
One enclosure.

War Department,
Office of the Chief of Engineers,

WASHINGTON, *June* 16, 1909.

Memorandum: For Mr. Van Etten.

511 War Department indorsement of September 19, 1905, authorizing the district engineer officer to permit borings to be made in the Hudson River, subject to conditions, as follows:

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"(*a*) That in making borings in Hudson River and in anchoring scows or boats in connection with the work herein proposed to be done only one such obstruction to navigation shall be in use at a time, and such obstruction shall be removed on completion of the work.

"(*b*) That said grantee shall maintain on the scows or boats such lights by night and flags by day as the Engineer Officer of the United States Army in charge of the locality may prescribe.

"(*c*) That the work herein proposed to be done shall be subject to the supervision and approval of the said local engineer officer.

"The regulations for signals to be displayed on scows or boats are recommended as follows:

"If the scow or boat is at the right side of the channel, looking down stream, a white light or flag at each end. If on the left side, a red light or flag at each end. Flags to be three feet square.

Permit of the Acting Secretary of War, dated February 2, 1906, as follows:

"SIR: In answer to your application of 23d ultimo, addressed to Col. W. R. Livermore, Corps of Engineers, permission, revocable at will by the Secretary of War, is hereby granted the Board of Water Supply of the City of New York, in accordance with the recommendation of the Chief of Engineers, U. S. Army, to
512 drive piles and anchor boats, as specified in said application, in the Hudson River, near New Hamburg, N. Y., on lines shown on map attached hereto, subject to the following conditions, viz:

1. That work shall not be in progress simultaneously on more than three borings on each of the three lines shown on the attached maps.

2. That there shall not be, at any time, less than 800 feet clear space between obstructions, except within 400 feet of either bank of the river.

3. That the Board of Water Supply of the City of New York shall hold itself responsible for any and all damages that may be inflicted upon navigation interests by said obstructions through any and all causes whatsoever.

4. That each single obstruction shall be entirely removed as soon as each boring is finished.

5. That all obstructions shall be entirely removed when, in the opinion of the Secretary of War, said removal shall become necessary to public interest.

6. That said board shall comply with the rules and regulations of the Light-House Establishment of the Department of Commerce and Labor concerning lights, sound signals for fog, etc., and shall maintain on each obstruction such other lights, flags or other signals as the Engineer Officer of the United States Army may prescribe.

513 7. That work herein permitted to be done shall be subject to the supervision and approval of the local officer of the Corps of Engineers, U. S. Army, whose address is Army Building, New York City."

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Indorsement, dated June 26, 1906, of the Acting Secretary of War, authorizing the district officer to permit the driving of piles and anchoring of boats, subject to the following conditions:

"(*a*) That work shall not be in progress simultaneously on more than three borings on each of the three lines shown on the accompanying maps.

(*b*) That there shall not be, at any time, less than 800 feet clear space between obstructions, except within 400 feet of either bank of the river.

(*c*) That the Board of Water Supply of the City of New York shall hold itself responsible for any and all damages that may be inflicted upon navigation interests by said obstructions through any and all causes whatsoever.

(*d*) That each single obstruction shall be entirely removed as soon as each boring is finished.

(*e*) That all obstructions shall be entirely removed when, in the opinion of the Secretary of War, said removal shall become necessary to public interest.

(*f*) That the said Board shall comply with the rules and
514 regulations of the Light-House Establishment of the Department of Commerce and Labor concerning lights, sound signals for fog, etc., and shall maintain on each obstruction such other lights, flags or other signals as the Engineer Officer of the United States Army may prescribe.

(*g*) That the work proposed shall be subject to the provision and approval of this office."

Indorsement, dated March 16, 1907, by the Assistant Secretary of War, authorizing modification of permit granted June 26, 1906, as follows, so that paragraph (*a*) shall read:

"That on the Storm King line work shall not be in progress simultaneously on more than three borings, except within 800 feet of the east shore where additional borings may be made simultaneously with those outside of this limit," and paragraph (*b*) shall read, "That there shall not be, at any time, less than 800 feet clear space between obstructions, except within 800 feet of the east shore.

Permit, dated May 20, 1907, as follows:

"SIR: In answer to your application of 1st instant, permission, revocable at will by the Secretary of War, is hereby granted the Board of Water Supply, City of New York, in accordance with the recommendation of the Acting Chief of Engineers, U. S. Army, to dump along both shores of the Hudson River in the vicinity of Cornwall and Storm King Station, spoil from tunnel shafts
515 to be sunk in connection with a water supply to be furnished from the Catskill Mountains, at the location shown on map attached hereto, subject to the following conditions:

"1. That the proposed work shall be completed on or before December 31, 1908.

2. That this permit shall not be construed as authorizing the invasion or impairment of the rights of any person or corporation; nor as relieving the grantee from liability for any injury that may be inflicted upon private or corporate interests.

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3. That the excavated material shall be disposed of according law.

4. That the grantee shall be held responsible for any and all mages that may be inflicted upon navigation interests through y and all causes whatsoever in consequence of work done under is permit.

5. That the grantee shall comply with the rules and regulations the Steamboat Inspection Service of the Department of Com- erce and Labor concerning lights, sounds, signals, etc., and shall aintain such other lights, flags, or other signals as the local En- neer Officer of the U. S. Army may prescribe.

6. That the spoil from the west shaft shall be deposited, if prac- cable, along the east shore, and that any material deposited along e west shore shall be so distributed as to leave no shoulders and no place extending the top of the slope into the river beyond the inner line marked 'top of slope.'

7. That the work herein permitted to be done shall be subject to the supervision and approval of the local officer of e Corps of Engineers, U. S. Army, whose address is Army Build- g, New York City."

Permit, dated July 8, 1907, as follows:

"SIR: Referring to War Department letter of May 20th last, anting the Board of Water Supply of the City of New York per- ission to dump along both shores of the Hudson River in the cinity of Cornwall and Storm King Station, spoil from tunnel afts to be sunk in connection with a water supply to be furnished om the Catskill Mountains, and replying to your letter of 24th timo, in which you request that said permit be modi-ed so as to ve a larger area for such dumping, I beg to inform you that the rmer permit is hereby modified, as requested, the additional area r dumping being shown in yellow on blueprint attached hereto, material to be dumped outside of the outer line marked 'Top of ope.'

Indorsement, dated February 19, 1908, by the Acting Secretary War, authorizing a further modification of the permit granted ne 26, 1906, as follows: So that conditions (*a*), (*b*) and (*f*) ill read as follows:

"(*a*) That on the Storm King line work shall not be in progress multaneously on more than four (4) borings, except within 800 feet of the east shore, where additional borings may be made simultaneously with those outside of this limit."

"(*b*) That except within eight hundred (800) feet of the st shore there shall be left unobstructed, during the progress of the oring work, two channels, one at least twenty-five (25) feet deep mean low water with a width of at least four hundred (400) et, and the other at least thirty (30) feet deep at mean low water ith a width of at least six hundred (600) feet in the clear."

"(*f*) That the said Board shall comply with the rules and regu- tions of the Light-House Establishment of the Department of ommerce and Labor concerning lights, sound signals for fog, etc., nd shall maintain such other lights and other signals on its plant

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anchored on the borders of the two channels specified in condition (*b*) as the Light-House Establishment may require, to indicate the approved channels."

Permit, dated January 23, 1909, as follows:

"DEAR SIR: Referring to War Department letter dated May 20, 1907, as modified by letter of July 8th, the same year, granting the Board of Water Supply of the City of New York, permission to dump material into the Hudson River along both shores, in the vicinity of Cornwall and Storm King Station, said material to be excavated from shafts to be sunk in connection with the Catskill Aqueduct water supply tunnel, and replying to your letter of 4th instant, in which you request a modification of the condition
518 of said permit so as to extend the limit of time for completion of the work to December 31, 1914, instead of December 31, 1908, and also for a further modification so as to permit the extension of the dumping areas as shown in green on map submitted, and the construction of temporary docks within the area shown in blue on the said map, I beg to inform you that the modifications requested are hereby granted, subject to the conditions specified in the original permit, modified as to limit of time, and to the further condition, viz:

"That the temporary docks shall be promptly removed upon expiration of the life of the permit or, sooner, if the work be completed or the permit revoked before such expiration."

PLAINTIFF'S EXHIBIT 22.

Cornell Steamboat Company,

Office of the General Manager,
Pier Foot West 51st Street,

Fred'k Coykendall, General Manager.

NEW YORK, *Sept.* 8, 1908.

Phœnix Construction Co., No. 41 Park Row, New York.

GENTLEMEN: Referring to our telephone conversation with your Mr. Belknap, we understand that you are to remove the drill formerly occupying the position nearest to the easterly shore
519 of the river opposite Storm King and to replace the drill occupying position about 600 feet from the westerly shore leaving also in place the two center drills in the positions they have occupied for some time.

In accordance with your request, we will, as much as possible use the channel on the easterly half of the river, but beg to remind you that under certain conditions of wind and tide it is impossible to take tows up and down on the easterly half of the river, and that under these conditions it will still be necessary to attempt to pass between the other drills.

We consider that under these conditions the drills represent an

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unreasonable obstruction to navigation and that they are a menace to navigation interests in general and to our interests in particular.

In view of this situation we must give notice that this Company does not consider itself liable for any injuries to these obstructions through any cause whatsoever that may have occurred up to the present time, and that we shall attempt to hold your Company liable for any injuries which may occur to our interests or to our equipment at any time.

We write this that you may have formal notice of our position in the matter.

Yours truly,

CORNELL STEAMBOAT CO.
FR. COYKENDALL,
General Manager.

520 PLAINTIFF'S EXHIBIT 23.

SEPTEMBER 10, 1908.

Cornell Steamboat Co., Foot West 51st Street, City.

GENTLEMEN: Regarding conversation referred to in your letter of September 8th, Mr. Coykendall agreed, at that time, not only to make application for permission to place light on channel bank opposite Polopel Island, but also to place said light himself.

Very truly,

THE PHOENIX CONSTRUCTION COMPANY.

Dic. F. W. B./U. R.

PLAINTIFF'S EXHIBIT 24.

Cornell Steamboat Company,
Office of the General Manager,
Pier Foot West 51st Street,
Fred'k Coykendall, General Manager.

NEW YORK, Sept. 11, 1908.

Phœnix Construction Co., No. 41 Park Row, New York.

GENTLEMEN: We acknowledge receipt your letter Sept. 10th.

In my conversation with Mr. Belknap, I first thought it would be an easy matter to place a light as suggested. I am advised, however, that this would involve complications for the Company,
521 and our attorneys think it best that we should not assume any responsibility in the matter.

If the government could be persuaded to place a light there themselves it would be all right, but this seems impossible as it is needed only because of special circumstances.

Yours truly,

CORNELL STEAMBOAT CO.
FR. COYKENDALL,
General Manager.

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PLAINTIFF'S EXHIBIT 25.

SEPTEMBER 12, 1908.

Cornell Steamboat Co., Foot West 51st Street, City.

GENTLEMEN: In answering your letter of September 11th, we wish to inform you that we accepted the statements of Mr. Coykendall in good faith; that we removed our easterly obstruction simply and solely because he suggested it, and because we had a desire, at that time, to be accommodating. If your attorneys have advised him to evade the responsibility of placing the light off Polopel, your attorneys have advised him to break a verbal agreement, which we, in his place, would have considered binding. Personally we are not interested in the placing of this light, as it was to be placed for the convenience of your company, but we cannot but feel that your failure to carry out the terms of the above mentioned verbal
522 agreement can only tend to strengthen our claim for damages in case of any accident.

Very respectfully,

THE PHŒNIX CONSTRUCTION COMPANY.

Dic. F. W. B./U. R.

PLAINTIFF'S EXHIBIT 26.

Cornell Steamboat Company,
Office of the General Manager,
Pier Foot West 51st Street,
Fredk. Coykendall, General Manager.

NEW YORK, *Sept.* 14, 1908.

Phœnix Construction Co., No. 41 Park Row, New York.

GENTLEMEN: We have your two letters of Sept. 13th, which do not, we think, correctly state the case.

We are not making any agreement as to the waters controlled by the United States Government, and in this matter we have no responsibility to assume or evade.

You stated to us plainly that your Company was acting under orders from the New York City Engineers and was powerless to remove or change the location of the drills at Storm King.

In accordance with this information I notified the City Engineers that because of the unreasonable obstruction we would apply to the Secretary of War to have the permits for locating these drills revoked.

523 In conference with the City Engineers, we finally agreed that if the westerly drill was not replaced until the work was finally finished on the easterly one, that we would not take any action towards having the permits revoked, as we thought this arrangement would minimize the danger. This is the whole of the arrangement entered into by this Company.

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All my conversations with Mr. Belknap have been because of the friendly relations between Mr. Shannon and the writer and have been as suggestions made in good faith for our mutual benefit, and not as agreements to do anything on the part of either Company, since you have stated your Company to be powerless in the matter.

While the location of the drills is primarily subject to the orders of the City Engineers, you seem to have some discretion in the matter. As far as this goes your attitude appears to be based, not on our necessities, but merely on your preference, based on your chances of profit, and for this reason it seemed advisable to have the position of this Company plainly stated, as was done in our letter of Sept. 8th.

We think there is no law which will permit you to impose temporary conditions endangering vested interests and then compel us to pay for the consequences. If there is, it is best that we all find it out as soon as possible.

Yours truly,

CORNELL STEAMBOAT CO.
FR. COYKENDALL,
General Manager.

524 PLAINTIFF'S EXHIBIT 27.

Cornell Steamboat Company,
Office of the General Manager,
Pier Foot West 51st Street,
Fredk. Coykendall, General Manager.

NEW YORK, *Sept.* 14, 1908.

Mr. Francis W. Belknap, Sec'y Phœnix Construction Co., No. 41 Park Row, New York.

DEAR SIR: As a further reply to your letter of Sept. 12th in which you state that I have broken a verbal agreement made with you, I want to say that you quite evidently misunderstood me. I was looking for protection for your drills, not for our tows. A collision is not likely to hurt our boats much and we do not fear the consequence of it.

You will recall that I suggested to you greater safety could be secured in two ways: by providing a helper tug to assist the tows, and by placing a light off Polopel Island.

You are entirely wrong when you say that the light is for the convenience of this Company, it is solely to help protect your drills.

If I led you to believe that this Company would provide, pay for and maintain either the tug or the light, I spoke contrary to my intention. We do not need the light, except to help keep you out of trouble.

What I intended to say was that I was willing to get all information and permits and have the light placed and I am still of the same mind, it being understood that this is done at your request.

525 It seems a common sense proposition that it is up to the party temporarily obstructing an otherwise clear channel to

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use every effort he can to make it as safe for navigation as it was before, and surely the placing of this light is a question arising only from the new conditions which the presence of these drills impose, and as you are the parties obstructing this channel, it follows that the placing and care of lights should be your duty.

I am afraid I overstepped myself in attempting to suggest anything, but it was done because of the relations between Mr. Shannon and myself, and because I thought that however sure each of us might be of the legal positions of our respective Companies, our mutual efforts should be exerted in every way to keep out of trouble. I am sorry that you seem to think otherwise.

I write this merely as a defense against the criticism expressed in your letter.

Yours truly,

CORNELL STEAMBOAT CO.,
FR. COYKENDALL,
General Manager.

PLAINTIFF'S EXHIBIT 28.

SEPTEMBER 19, 1908.

Cornell Steamboat Co., Foot West 51st Street, City.

GENTLEMEN: We wish to call your attention to the fact that your tows are not using the easterly channel which we prepared
526 for you, according to agreement, but are passing between our westerly boring and the one next to the east of it. At 2:00 A. M., on the morning of the 18th, the tug "Washburn" ran into our scow "A," but fortunately no damage was done.

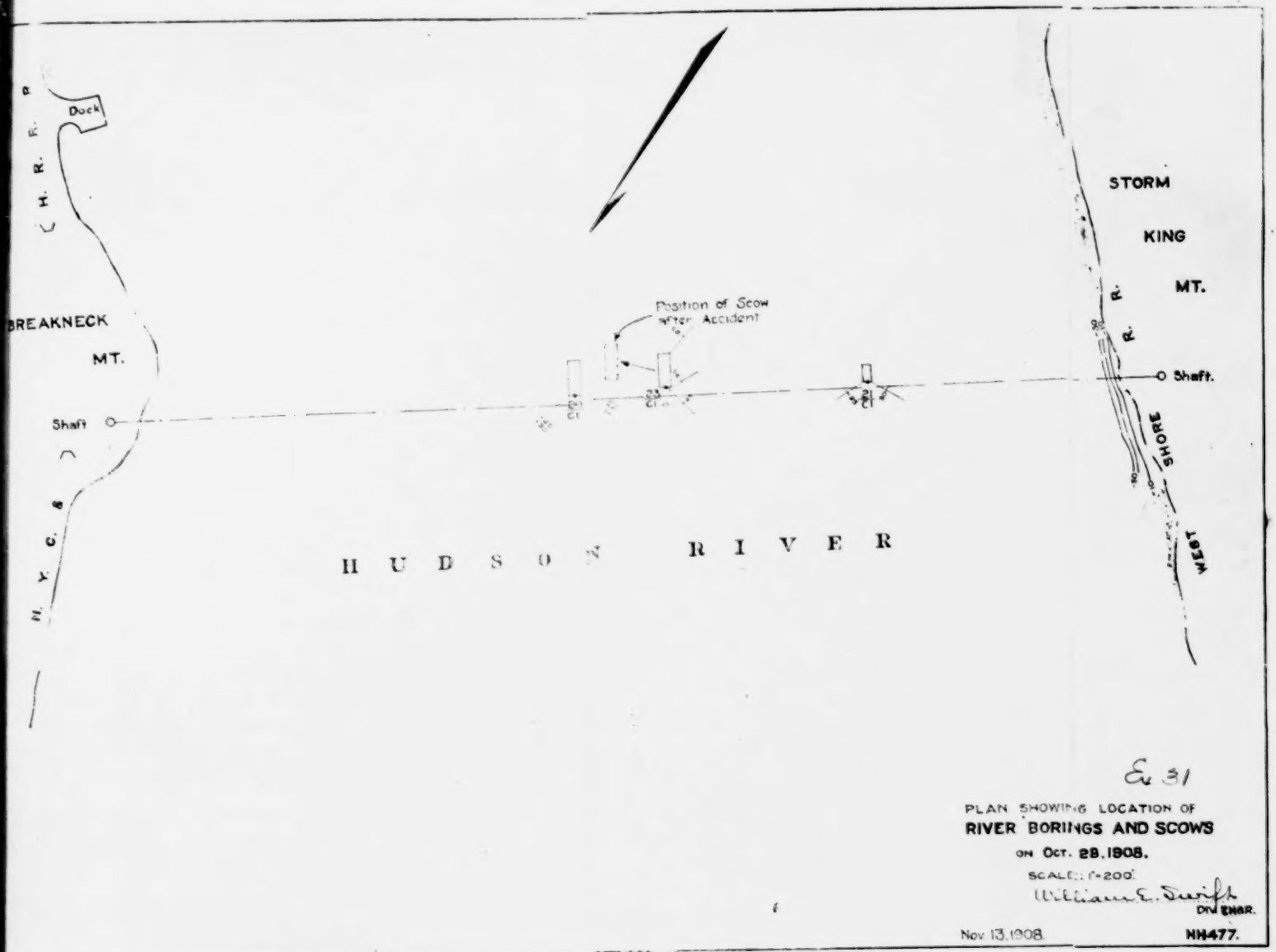
In your letter of September 14th, you state that in your conference with the City Engineers, you finally agreed that if the westerly drill was not replaced until the work was finished on the easterly one, you could take no action. At the present time, as far as you are concerned, the easterly channel is in the identical condition it would be in were the work on the above mentioned easterly boring completed. We notified you of this fact in our letter of September 12th.

Very truly,

THE PHŒNIX CONSTRUCTION COMPANY.

Dic. F. W. B./U. R.

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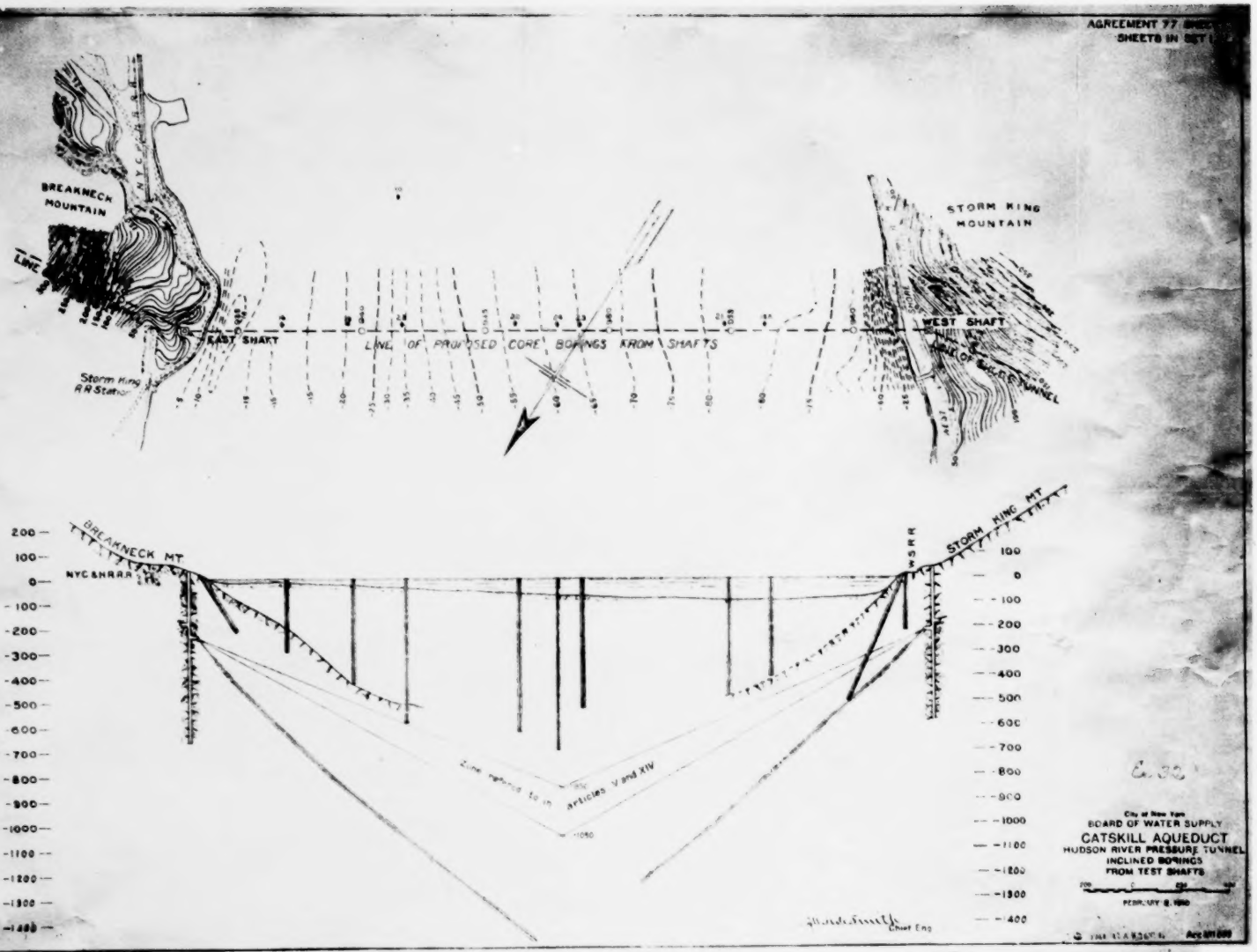
E 31

PLAN SHOWING LOCATION OF
RIVER BORINGS AND SCOWS
ON OCT. 28, 1908.
SCALE: 1"=200'

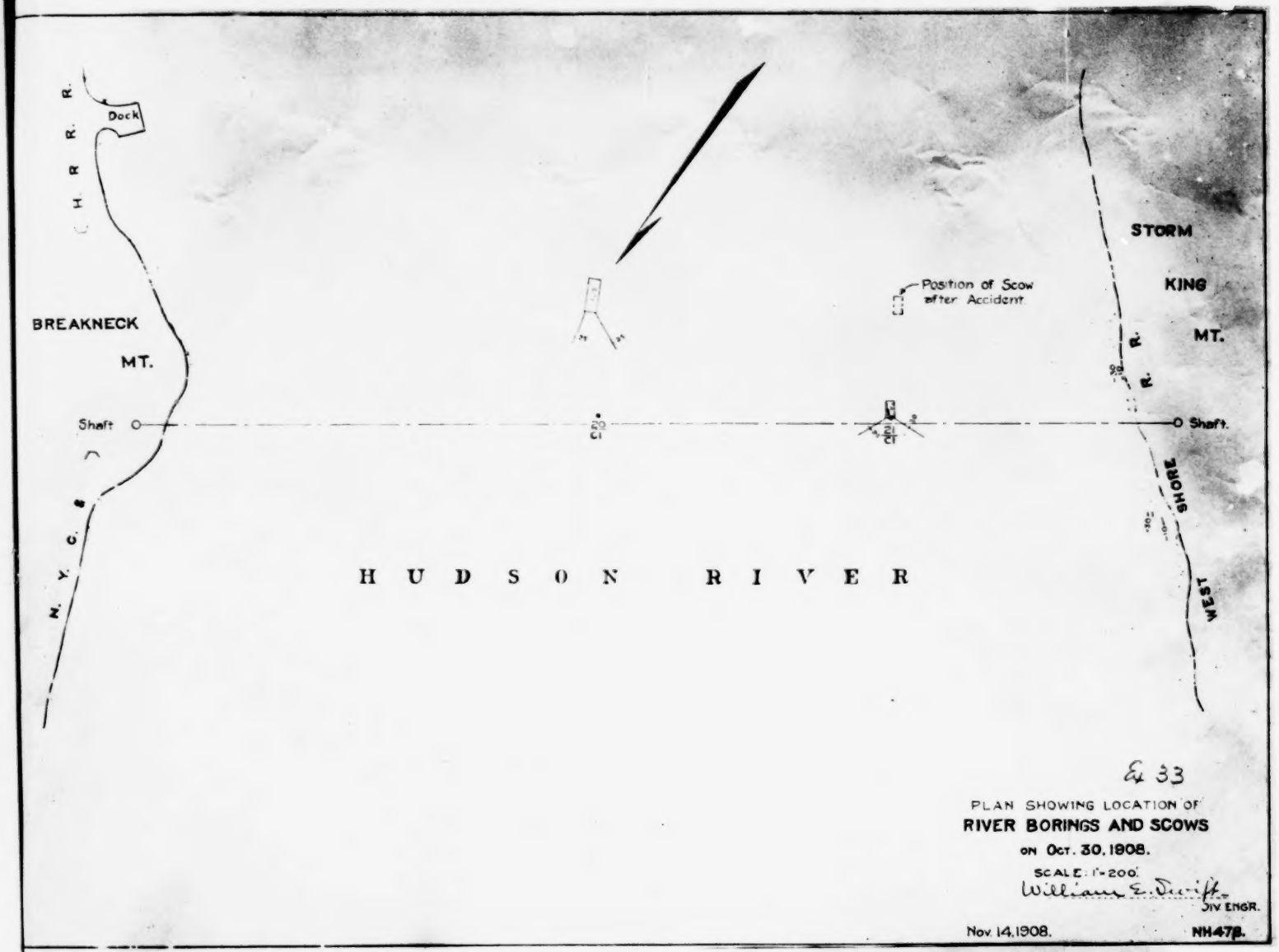
William E. Swift
DIV. ENGR.

Nov. 13, 1908. NH477.

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PLAN SHOWING LOCATION OF
RIVER BORINGS AND SCOWS
ON OCT. 30, 1908.
SCALE 1"=200'
William E. Swift
DIV ENGR.
Nov. 14, 1908.
NH-47B.

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PLAINTIFF'S EXHIBIT 29.

Cornell Steamboat Company,
Office of the General Manager,
Pier Foot West 51st Street,
Fredk. Coykendall, General Manager.

NEW YORK, *Sept.* 22, 1908.

Phœnix Construction Co., No. 41 Park Row, New York.

GENTLEMEN: We acknowledge receipt your letter of Sept. 19th.

We are instructing our captains today to comply with your
527 wishes as far as possible in using the channel on the easterly half of the river opposite Storm King. As we have before stated, however, special conditions of wind and tide make this impossible.

We will avoid passing between the drills on the westerly half of the river, except in cases where in the judgment of the captain the channel cannot be safely used.

Yours truly,

CORNELL STEAMBOAT CO.,
FR. COYKENDALL,
General Manager.

PLAINTIFF'S EXHIBIT 30.

SEPTEMBER 24, 1908.

Cornell Steamboat Co., Foot West 51st Street, City.

GENTLEMEN: In acknowledging the receipt of your letter of September 22nd, we note that you will instruct your captains to use the easterly channel as far as possible. When the special conditions of wind and tide prevail, which in your opinion renders the use of the easterly channel impracticable, would it not be possible for your tows to pass to the westward of our westerly boring, instead of passing between the two westerly borings.

The channel between the westerly boring and the west shore is six hundred feet wide, whereas, the channel between the two westerly borings is only four hundred feet wide.

Very truly yours,

THE PHŒNIX CONSTRUCTION COMPANY.

Dic. F. W. B./U. R.

(Here follow Exhibits 31, 32, 33, marked pages 527*a*, 527*b*, and 527*c*.)

528 *Stipulation.*

Supreme Court, New York County.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff-Respondent,
vs.
CORNELL STEAMBOAT COMPANY, Defendant-Appellant.

It is hereby stipulated by the attorneys for the respective parties in the above entitled actions that the foregoing are true copies of the notices of appeal, the pleadings, requests to find, exceptions thereto, findings and decisions, judgments and the case and exceptions in each of the three actions as settled and ordered herein, and the whole thereof, and that said actions contain all the evidence in and proceedings had upon the trial of said actions and each of them, and that the printed cases may be filed.

Dated April 10th, 1911.

E. CROSBY KINDLEBERGER,
Attorney for Plaintiff.
AMOS VAN ETTEN,
Attorney for Defendant.

529 *Certificate.*

Supreme Court, New York County.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff-Respondent,
vs.
CORNELL STEAMBOAT COMPANY, Defendant-Appellant.

I, the undersigned, the referee before whom the above entitled actions were tried, do hereby certify that the foregoing cases on appeal contain all the evidence given and proceedings had on the trial of each of said actions, and the same are hereby settled and ordered filed pursuant to law.

Dated April 10th, 1911.

CHAS. F. BROWN, *Referee.*

530 *Order of Affirmance on Appeal from Judgment Entered on Decision of the Court or on Report of Referee.*

At a Term of the Appellate Division of the Supreme Court Held in and for the First Judicial Department in the County of New York on the 3rd Day of November, 1911.

Present:

Hon. George L. Ingraham,
Presiding Justice;
" Frank C. Laughlin,
" Francis M. Scott,
" Nathan L. Miller,
" Victor J. Dowling,
Justices.

2049.

Action No. I.

THE PHŒNIX CONSTRUCTION COMPANY, Respondent,
vs.
CORNELL STEAMBOAT COMPANY, Appellant.

An appeal having been taken to this Court by the defendant from a judgment of the Supreme Court entered on the 6th day of September, 1910, and the said appeal having been argued by Mr. J. Parker Kirlin of counsel for the appellant, and by Mr. E. Crosby Kindleberger of counsel for the respondent, and due deliberation having been had thereon, it is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed, and that the respondent recover of the appellant the costs of this appeal.

Enter.

G. L. I.

531 *Order of Affirmance on Appeal from Judgment Entered on Decision of the Court or on Report of Referee.*

At a Term of the Appellate Division of the Supreme Court Held in and for the First Judicial Department in the County of New York on the 3rd Day of November, 1911.

Present:

Hon. George L. Ingraham,
Presiding Justice;
" Frank C. Laughlin,
" Francis M. Scott,
" Nathan L. Miller,
" Victor J. Dowling,
Justices.

Action No. II.

THE PHŒNIX CONSTRUCTION COMPANY, Respondent-Appellant,
vs.
CORNELL STEAMBOAT COMPANY.

An appeal having been taken to this Court by the defendant from a judgment of the Supreme Court entered on the 6th day of September, 1910, and by the plaintiff from a part of said judgment and the said appeal having been argued by Mr. J. Parker Kirlin of counsel for the defendant, and by Mr. E. Crosby Kindleberger of counsel for the plaintiff, and due deliberation having been had thereon, it is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed, without costs.

Enter.

G. L. I.

532 *Order of Affirmance on Appeal from Judgment Entered on Decision of the Court or on Report of Referee.*

At a Term of the Appellate Division of the Supreme Court Held in and for the First Judicial Department in the County of New York on the 3rd Day of November, 1911.

Present:

Hon. George L. Ingraham,
Presiding Justice;
" Frank C. Laughlin,
" Francis M. Scott,
" Nathan L. Miller,
" Victor J. Dowling,
Justices.

2051.

Action No. III.

THE PHŒNIX CONSTRUCTION COMPANY, Respondent,
vs.
CORNELL STEAMBOAT COMPANY, Appellant.

An appeal having been taken to this Court by the defendant from a judgment of the Supreme Court entered on the 6th day of September, 1910, and the said appeal having been argued by Mr. J. Parker Kirlin of counsel for the appellant, and by Mr. E. Crosby Kindleberger of counsel for the respondent, and due deliberation having been had thereon, it is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed, and that the respondent recover of the appellant the costs of this appeal.

Enter.

G. L. I.

533 *Judgment of Appellate Division.*

Supreme Court, Appellate Division, First Department.

Action No. I.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff-Respondent,
against
CORNELL STEAMBOAT COMPANY, Defendant-Appellant.

The defendant having appealed from the judgment entered herein on the 6th day of September, 1910, in favor of the plaintiff, Phœnix Construction Company, for the sum of Four Thousand one hundred forty-six and 58/100 dollars, ($4,146.58), to the Appellate

Division of the Supreme Court, First Department, and said appeal having been duly heard and said Appellate Division having unanimously ordered said judgment to be affirmed with the costs and disbursements of said appeal to said plaintiff-respondent, and said costs having been duly taxed at the sum of One hundred and forty-three and 57/100 dollars, ($143.57); now, on motion of E. Crosby Kindleberger, attorney for plaintiff, Phœnix Construction Company, it is

Unanimously Ordered and Adjudged, that the said judgment so appealed from, be, and the same is hereby in all things affirmed, and that the Phœnix Construction Company recover of the Cornell Steamboat Company, the defendant, the sum of One hundred forty-three and 57/100 dollars, ($143.57), costs as taxed.

Judgment signed and entered this 8th day of November, 1911.

[SEAL.] WILLIAM F. SCHNEIDER, *Clerk*.

534 *Judgment of Appellate Division.*

Supreme Court, Appellate Division, First Department.

Action No. II.

THE PHŒNIX CONSTRUCTION COMPANY, Pl't'f-Resp't-App'l't,
against
CORNELL STEAMBOAT COMPANY, Def't-App'l't-Resp't.

The defendant having appealed from the judgment entered herein on the 6th day of September, 1910, in favor of the plaintiff, Phœnix Construction Company, for the sum of Four thousand four hundred thirty-two and 52/100 dollars, ($4,432.52), to the Appellate Division of the Supreme Court, First Department, and the plaintiff having also appealed to the said Appellate Division from a part of said judgment, and said appeals having been duly heard, and said Appellate Division having unanimously ordered said judgment to be affirmed but without costs; now, on motion of E. Crosby Kindleberger, attorney for plaintiff, Phœnix Construction Company, it is

Unanimously Ordered and Adjudged, that the said judgment so appealed from, be, and the same is hereby in all things affirmed.

Judgment signed and entered this 8th day of November, 1911.

[SEAL.] WILLIAM F. SCHNEIDER, *Clerk*.

535 *Judgment of Appellate Division.*

Supreme Court, Appellate Division, First Department.

Action No. III.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff-Respondent,
against
CORNELL STEAMBOAT COMPANY, Defendant-Appellant.

The defendant having appealed from the judgment entered herein on the 6th day of September, 1910, in favor of the plaintiff, Phœnix

Construction Company, for the sum of Nine thousand nine hundred eight and 36/100 dollars, ($9,908.36), to the Appellate Division of the Supreme Court, First Department, and said appeal having been duly heard and said Appellate Division having unanimously ordered said judgment to be affirmed with the costs and disbursements of said appeal to said plaintiff-respondent, and said costs having been duly taxed at the sum of One hundred fifty-two and 87/100 dollars, ($152.87); now, on motion of E. Crosby Kindleberger, attorney for plaintiff, Phœnix Construction Company, it is

Unanimously Ordered and Adjudged, that the said judgment so appealed from, be, and the same is hereby in all things affirmed, and that the Phœnix Construction Company recover of the Cornell Steamboat Company, the defendant, the sum of One hundred fifty-two and 87/100 dollars, ($152.87), costs as taxed.

Judgment signed and entered this 8th day of November, 1911.

WILLIAM F. SCHNEIDER, *Clerk*.

536 *Notice of Motion to Resettle Orders.*

Supreme Court, Appellate Division, First Department.

Action No. I, Cal. No. 2049.

Action No. II, Cal. No. 2050.

Action No. III, Cal. No. 2051.

THE PHŒNIX CONSTRUCTION COMPANY, Respondent,
vs.
CORNELL STEAMBOAT COMPANY, Appellant.

You Will Please Take Notice, that upon the record and orders of affirmance entered with the clerk of the Appellate Division and the affidavit of the attorney for the defendant-appellant in each of the cases herewith presented, I shall apply to the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 2nd day of December, 1911, at ten o'clock A. M., for a re-settlement of the orders of affirmance in each of the actions, and herewith present a proposed order which I shall ask the Court to enter.

Dated, November 30, 1911.

Yours, etc.,

AMOS VAN ETTEN,
Attorney for Defendant-Appellant,
22 *Ferry Street, Kingston, N. Y.*

To E. Crosby Kindleberger, Esq., Attorney for Plaintiff-Respondent.

537 *Affidavit.*

Supreme Court, Appellate Division, First Department.

Action No. I, Cal. No. 2049.

Action No. II, Cal. No. 2050.

Action No. III, Cal. No. 2051.

THE PHŒNIX CONSTRUCTION COMPANY, Respondent,
vs.
CORNELL STEAMBOAT COMPANY, Appellant.

STATE OF NEW YORK,
County of Ulster, ss:

Amos Van Etten, being duly sworn, deposes and says, he is an attorney and counselor at law, residing at the City of Kingston, Ulster County, N. Y., and is the attorney for the defendant-appellant, Cornell Steamboat Company, in each of the above entitled actions.

That the above entitled appeals were argued before a Term of this Court on the 12th day of October, 1911, by J. Parker Kirlin, Esq., counsel for defendant-appellant, and E. Crosby Kindleberger, Esq., counsel for plaintiff-respondent. That on the 3d day of November, 1911, the Court handed down decisions as follows:

2049, 2051.

THE PHŒNIX CONSTRUCTION COMPANY, Respondent,
vs.
CORNELL STEAMBOAT COMPANY, Appellant.

Judgments affirmed with costs. No opinion. All concur.

538 LAUGHLIN and MILLER, *JJ.*:

Solely on the ground that authority was given by the Secretary of War to make the borings and anchor the barges in the river. Orders filed.

2050.

THE PHŒNIX CONSTRUCTION COMPANY, Respondent-Appellant,
vs.
CORNELL STEAMBOAT COMPANY, Appellant-Respondent.

Judgment affirmed without costs. No opinion. Order filed."

And that thereafter judgments were filed and entered in the County Clerk's office of New York County accordingly.

That neither the orders entered nor the judgments entered in accordance with such orders in any wise show that the Justices in the Court differed in their ground of decision. The appellant intends to appeal from each of such judgments to the Court of Appeals of the State of New York, and desires to have in the record on such appeal the memoranda of the decision incorporated in the record and for that purpose would like to have the orders re-settled and asks that the same, and each of them, be re-settled in accordance with the orders herewith proposed.

AMOS VAN ETTEN.

Sworn to before me this 24th day of November, 1911.

HERMON T. WOOD,
Notary Public, Ulster County, N. Y.

539 *Proposed Order, Action No.* 1.

At a Term of the Appellate Division of the Supreme Court Held in and for the First Judicial Department in the County of New York on the — Day of November, 1911.

Present:

Hon. George L. Ingraham,
Presiding Justice.

2049.

Action No. 1.

THE PHŒNIX CONSTRUCTION COMPANY, Respondent,
vs.
CORNELL STEAMBOAT COMPANY, Appellant.

The above entitled action in this Court having been heretofore and on the 12th day of October, 1911, argued by Mr. J. Parker Kirlin of counsel for the appellant and Mr. E. Crosby Kindleberger of counsel for the respondent, and due deliberation having been had thereon, and an order entered on the 3d day of November, 1911, in form as follows:

540 *Order of Affirmance on Appeal from Judgment Entered on Decision of Court or on Report of Referee.*

"At a Term of the Appellate Division of the Supreme Court Held in and for the First Judicial Department in the County of New York on the 3rd Day of November, 1911.

Present:

Hon. George L. Ingraham,
Presiding Justice;
" Frank C. Laughlin,
" Francis M. Scott,
" Nathan L. Miller,
" Victor J. Dowling,
Justices.

2049.

Action No. I.

THE PHŒNIX CONSTRUCTION COMPANY, Respondent,
vs.
CORNELL STEAMBOAT COMPANY, Appellant.

An appeal having been taken to this Court by the defendant from a judgment of the Supreme Court entered on the 6th day of September, 1910, and the said appeal having been argued by Mr. J. Parker Kirlin, of counsel for the appellant, and by Mr. E. Crosby Kindleberger of counsel for the respondent, and due deliberation having been had thereon, it is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed, and that the respondent recover of the appellant the costs of this appeal.

Enter.

G. L. I."

541 And the defendant-appellant having moved for a resettlement of such order on an affidavit and all the papers before this court which were submitted to the court on the — day of November, 1911,

It is Ordered, that the order of affirmance on the appeal herein be and the same is re-settled so as to read as follows:

Order of Affirmance on Appeal from Judgment Entered on Decision of the Court or on Report of Referee.

At a Term of the Appellate Division of the Supreme Court Held in and for the First Judicial Department in the County of New York on the 3d Day of November, 1911.

Pesent:

Hon. George L. Ingraham,
Presiding Justice;
" Frank C. Laughlin,
" Francis M. Scott,
" Nathan L. Miller,
" Victor J. Dowling,
Justices.

2049.

Action No. I.

THE PHŒNIX CONSTRUCTION COMPANY, Respondent,
vs.
CORNELL STEAMBOAT COMPANY, Appellant.

An appeal having been taken to this Court by the defendant from a judgment of the Supreme Court entered on the 6th day of September, 1910, and the said appeal having been argued by
542 Mr. J. Parker Kirlin of counsel for the appellant and by Mr. E. Crosby Kindleberger of counsel for the respondent, and due deliberation having been had thereon, and the court having rendered its decision as follows:

"Judgment affirmed with costs. No opinion. All concur.

LAUGHLIN and MILLER, *JJ.*:

Solely on the ground that authority was given by the secretary of war to make the borings and anchor the barges in the river," it is unanimously ordered and adjudged that the judgment so appealed from be and the same hereby is, in all things, affirmed, and that the respondent recover of the appellant the costs of this appeal.

Enter.

Proposed Order, Action No. 2.

At a Term of the Appellate Division of the Supreme Court Held in and for the First Judicial Department in the County of New York on the — Day of November, 1911.

Present:

Hon. George L. Ingraham,
Presiding Justice.

2050.

Action No. II.

THE PHŒNIX CONSTRUCTION COMPANY, Respondent,
vs.
CORNELL STEAMBOAT COMPANY, Appellant.

The above entitled action in this Court having been heretofore and on the 12th day of October, 1911, argued by Mr. J. Parker Kirlin of counsel for the appellant, and Mr. E. Crosby Kindleberger of counsel for the respondent, and due deliberation having been had thereon, and an order entered on the 3d day of November, 1911, as follows:

543

Order of Affirmance on Appeal from Judgment Entered on Decision of the Court or on Report of Referee.

"At a Term of the Appellate Division of the Supreme Court Held in and for the First Judicial Department in the County of New York on the 3rd Day of November, 1911.

Present:

Hon. George L. Ingraham,
Presiding Justice;
" Frank C. Laughlin,
" Francis M. Scott,
" Nathan L. Miller,
" Victor J. Dowling,
Justices.

Action No. II.

THE PHŒNIX CONSTRUCTION COMPANY, Respondent-Appellant,
vs.
CORNELL STEAMBOAT COMPANY.

An appeal having been taken to this Court by the defendant from a judgment of the Supreme Court entered on the 6th day of Septem-

COPY BOUND

ber, 1910, and by the plaintiff from a part of said judgment, and the said appeal having been argued by Mr. J. Parker Kirlin, of counsel for the defendant, and by Mr. E. Crosby Kindleberger of counsel for the plaintiff, and due deliberation having been had thereon, it is

unanimously ordered and adjudged that the judgment so ap-
544 pealed from be and the same is hereby, in all things, affirmed, without costs.

Enter.

G. L. I."

And the defendant-appellant having moved for a resettlement of such order on an affidavit and all the papers before this Court which were submitted to the Court on the — day of November, 1911;

It is Ordered, that the order of affirmance on the appeal herein be and the same is re-settled so as to read as follows:

Order of Affirmance on Appeal from Judgment Entered on Decision of the Court or on Report of Referee.

At a Term of the Appellate Division of the Supreme Court Held in and for the First Judicial Department in the County of New York on the 3d Day of November, 1911.

Present:

Hon. George L. Ingraham,
Presiding Justice;
" Frank C. Laughlin,
" Francis M. Scott,
" Nathan L. Miller,
" Victor J. Dowling,
Justices.

Action No. II.

THE PHŒNIX CONSTRUCTION COMPANY, Respondent-Appellant,
vs.
CORNELL STEAMBOAT COMPANY.

An appeal having been taken to this Court by the defendant from a judgment of the Supreme Court entered on the 6th day of
545 September, 1910, and by the plaintiff from a part of said Judgment, and the said appeal having been argued by Mr. J. Parker Kirlin, of counsel for the defendant, and by Mr. E. Crosby Kindleberger, of counsel for the plaintiff, and due deliberation having been had thereon, and the Court having rendered its decision as follows:

"Judgment affirmed without costs. No opinion;" it is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed, without costs.

Enter.

CLOSE IN CENTER

At a Term of the Appellate Division of the Supreme Court Held in and for the First Judicial Department in the County of New York on the — Day of November, 1911.

Present:

Hon. George L. Ingraham,
Presiding Justice.

2051.

Action No. III.

THE PHŒNIX CONSTRUCTION COMPANY, Respondent,
vs.
CORNELL STEAMBOAT COMPANY, Appellant.

The above entitled action in this Court having been heretofore and on the 12th day of October, 1911, argued by Mr. J. Parker Kirlin of counsel for the appellant, and Mr. E. Crosby Kindleberger of counsel for the respondent, and due deliberation having been had thereon, and an order entered on the 3d day of November, 1911, as follows:

546 *Order of Affirmance on Appeal from Judgment Entered on Decision of the Court or on Report of Referee.*

"At a Term of the Appellate Division of the Supreme Court Held in and for the First Judicial Department in the County of New York on the 3rd Day of November, 1911.

Present:

Hon. George L. Ingraham,
Presiding Justice;
" Frank C. Laughlin,
" Francis M. Scott,
" Nathan L. Miller,
" Victor J. Dowling,
Justices.

2051.

Action No. III.

THE PHŒNIX CONSTRUCTION COMPANY, Respondent,
against
CORNELL STEAMBOAT COMPANY, Appellant.

An appeal having been taken to this Court by the defendant from a judgment of the Supreme Court entered on the 6th day of September, 1910, and the said appeal having been argued by Mr. J. Parker

COPY BOUND

Kirlin, of counsel for the appellant, and by Mr. E. Crosby Kindleberger of counsel for the respondent, and due deliberation having been had thereon, it is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed, and that the respondent recover of the appellant the costs of this appeal.

Enter.

G. L. I."

547 And the defendant-appellant having moved for a resettlement of such order on an affidavit and all the papers before this court which were submitted to the court on the — day of November, 1911;

It is Ordered, that the order of affirmance on the appeal herein be and the same is re-settled so as to read as follows:

Order of Affirmance on Appeal from Judgment Entered on Decision of the Court or on Report of the Referee.

At a Term of the Appellate Division of the Supreme Court Held in and for the First Judicial Department in the County of New York on the 3rd day of November, 1911.

Present:

Hon. George L. Ingraham,
Presiding Justice;
" Frank C. Laughlin,
" Francis M. Scott,
" Nathan L. Miller,
" Victor J. Dowling,
Justices.

2051.

Action No. III.

THE PHŒNIX CONSTRUCTION COMPANY, Respondent,
vs.
CORNELL STEAMBOAT COMPANY, Appellant.

An appeal having been taken to this Court by the defendant from a judgment of the Supreme Court entered on the 6th day of September, 1910, and the said appeal having been argued by Mr. J. Parker Kirlin, of counsel for the appellant, and by Mr. E. Crosby
548 Kindleberger, of counsel for the respondent, and due deliberation having been had thereon, and the Court having rendered its decision as follows:

"Judgment affirmed with costs. No opinion. All concur.

CLOSE IN CENTER

LAUGHLIN and MILLER, *JJ.*:

Solely on the ground that authority was given by the Secretary of War to make the borings and anchor the barges in the river," it is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed, and that the respondent recover of the appellant the costs of this appeal.

Enter.

Order Denying Motion.

At a Term of the Appellate Division of the Supreme Court Held in and for the First Judicial Department in the County of New York on the 8th day of December, 1911.

Present:

Hon. George L. Ingraham,
Presiding Justice;
" Frank C. Laughlin,
" Francis M. Scott,
" Nathan L. Miller,
" Victor J. Dowling,
Justices.

Action No. I.

THE PHŒNIX CONSTRUCTION COMPANY, Respondent,
vs.
CORNELL STEAMBOAT COMPANY, Appellant.

549 A motion having heretofore been made by the attorney for the Cornell Steamboat Company on the 2nd day of December, 1911, for an order resettling the order of affirmance in the above entitled action now upon reading and filing the notice of motion and the affidavit of Amos Van Etten, verified November 24, 1911, and the proposed order in support of said motion, and the order of this court heretofore entered herein on the 3d day of November, 1911, and after hearing J. Parker Kirlin, of counsel for defendant-appellant, in support of said motion, and E. Crosby Kindleberger, of counsel for plaintiff-respondent in opposition thereto, and due deliberation having been had, it is

Ordered, that the said motion to resettle said order of affirmance of November 3, 1911, be and the same hereby is in all respects denied.

Enter.

G. L. I.

COPY BOUND

550 *Order Denying Motion.*

At a Term of the Appellate Division of the Supreme Court Held in and for the First Judicial Department in the County of New York on the 8th Day of December, 1911.

Present:

Hon. George L. Ingraham,
Presiding Justice;
" Frank C. Laughlin,
" Francis M. Scott,
" Nathan L. Miller,
" Victor J. Dowling,
Justices.

Action No. II.

THE PHOENIX CONSTRUCTION COMPANY, Respondent-Appellant,
against
CORNELL STEAMBOAT COMPANY, Appellant-Respondent.

A motion having heretofore been made by the attorney for the Cornell Steamboat Company on the 2nd day of December, 1911, for an order resettling the order of affirmance in the above entitled action now upon reading and filing the notice of motion and the affidavit of Amos Van Etten, verified November 24, 1911, and the proposed order in support of said motion, and the order of this court heretofore entered herein on the 3d day of November, 1911, and after hearing J. Parker Kirlin, of counsel for defendant-appellant-respondent, in support of said motion, and E. Crosby Kindleberger, of counsel for plaintiff-respondent-appellant in opposition thereto and due deliberation having been had, it is

551 Ordered, that the said motion to resettle said order of affirmance of November 3, 1911, be and the same hereby is in all respects denied.

Enter.

G. L. I.

D CLOSE IN CENTER

552 *Order Denying Motion.*

At a Term of the Appellate Division of the Supreme Court Held in and for the First Judicial Department in the County of New York on the 8th Day of December, 1911.

Present:

Hon. George L. Ingraham,
Presiding Justice;
" Frank C. Laughlin,
" Francis M. Scott,
" Nathan L. Miller,
" Victor J. Dowling,
Justices.

Action No. III.

THE PHŒNIX CONSTRUCTION COMPANY, Respondent,
against
CORNELL STEAMBOAT COMPANY, Appellant.

A motion having heretofore been made by the attorney for the Cornell Steamboat Company on the 2nd day of December, 1911, for an order resettling the order of affirmance in the above entitled action now upon reading and filing the notice of motion and the affidavit of Amos Van Etten, verified November 24, 1911, and the proposed order in support of said motion, and the order of this court heretofore entered herein on the 3d day of November, 1911, and after hearing J. Parker Kirlin, of counsel for defendant-appellant, in support of said motion, and E. Crosby Kindleberger, of counsel for plaintiff-respondent in opposition thereto, and due deliberation having been had, it is

553 Ordered, that the said motion to resettle said order of affirmance of November 3, 1911, be and the same hereby is in all respects denied.

Enter.

G. L. I.

Notice of Appeal.

Supreme Court.

Action No. I.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff-Respondent,
against
CORNELL STEAMBOAT COMPANY, Defendant-Appellant.

You Will Please Take Notice, that the Cornell Steamboat Company, defendant-appellant herein, hereby appeals to the Court

554 of Appeals of the State of New York from a judgment entered upon an order of the Appellate Division of the Supreme Court, First Department, in the Clerk's Office of the County of New York, on the 8th day of November, 1911, which judgment affirmed a judgment heretofore rendered in the Supreme Court, New York County, in favor of the plaintiff against the defendant for Four thousand one hundred forty-six and 58/100 dollars, ($4,146.58), with costs of appeal in the Appellate Court amounting to One hundred forty-three and 57/100 dollars, ($143.57), and from such order of affirmance and from the whole and every part of such judgment and order.

You Will Also Take Notice, that the appellant intends to review on this appeal an order made in the above action by the Appellate Division refusing a re-settlement of the order made on the appeal.

Dated, December 11th, 1911.

Yours, etc.,

AMOS VAN ETTEN,
Attorney for Defendant-Appellant.

To William F. Schneider, Esq., Clerk of New York County, and E. Crosby Kindleberger, Esq., Attorney for Plaintiff-Respondent.

555 *Notice of Appeal.*

Supreme Court.

Action No. II.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff-Respondent,
against
CORNELL STEAMBOAT COMPANY, Defendant-Appellant.

You Will Please Take Notice, that the Cornell Steamboat Company, defendant-appellant herein, hereby appeals to the Court of Appeals of the State of New York from a judgment entered upon an order of the Appellate Division of the Supreme Court, First Department, in the Clerk's Office of the County of New York, on the 8th day of November, 1911, which judgment affirmed a judgment heretofore rendered in the Supreme Court, New York County, in favor of the plaintiff against the defendant, for Four thousand four hundred thirty-two and 52/100 dollars, ($4,432.52), and from such order of affirmance and from the whole and every part of such judgment and order.

You Will Also Take Notice, that the appellant intends to review on this appeal an order made in the above action by the Appellate Division refusing a re-settlement of the order made on the appeal.

Dated, December 11th, 1911.

Yours, etc.,

AMOS VAN ETTEN,
Attorney for Defendant-Appellant.

To William F. Schneider, Esq., Clerk of New York County, and E. Crosby Kindleberger, Esq., Attorney for Plaintiff-Respondent.

556 *Notice of Appeal.*

Supreme Court.

Action No. III.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff-Respondent,
against
CORNELL STEAMBOAT COMPANY, Defendant-Appellant.

You Will Please Take Notice, that the Cornell Steamboat Company, defendant-appellant herein, hereby appeals to the Court of Appeals of the State of New York from a judgment entered upon an order of the Appellate Division of the Supreme Court, First Department, in the Clerk's Office of the County of New York, on the 8th day of November, 1911, which judgment affirmed a judgment heretofore rendered in the Supreme Court, New York County, in favor of the plaintiff against the defendant, for Nine thousand nine hundred eight and 36/100 dollars, ($9,908.36), with costs of appeal in the Appellate Court amounting to One hundred fifty-two and 87/100 dollars, ($152.87), and from such order of affirmance and from the whole and every part of such judgment and order.

You Will Also Take Notice, that the appellant intends to review on this appeal an order made in the above action by the Ap-
557 pellate Division refusing a re-settlement of the order made on the appeal.

Dated, December 11th, 1911.

Yours, etc.,

AMOS VAN ETTEN,
Attorney for Defendant-Appellant.

To William F. Schneider, Esq., Clerk of New York County, and E. Crosby Kindleberger, Esq., Attorney for Plaintiff-Respondent.

Affidavit of No Opinion.

Supreme Court.

Actions Nos. 1, 2, 3.

THE PHŒNIX CONSTRUCTION COMPANY, Plaintiff-Respondent,
vs.
CORNELL STEAMBOAT COMPANY, Defendant-Appellant.

STATE OF NEW YORK,
County of Ulster, ss:

Amos Van Etten, being duly sworn, deposes and says, he is the attorney for the Cornell Steamboat Company, the appellant in each of the above entitled actions and the respondent in action No. 2.

That the following is a copy of the decision made by the
558 Appellate Division in Actions Nos. 1 and 3; "Judgment affirmed with costs. No. opinion. All concur.

LAUGHLIN and MILLER, *JJ.*:

Solely on the ground that authority was given by the Secretary of War to make the borings and anchor the barges in the river. Orders filed." And in Action No. 2: "Judgment affirmed without costs. No opinion. Order filed."

That no opinion was handed down by such Court as deponent is advised by the Clerk of said Court.

AMOS VAN ETTEN.

Subscribed and sworn to before me this 30th day of December, 1911.

C. J. HEITZMAN,
Notary Public.

Stipulation Waiving Certification.

It is hereby stipulated that the papers as hereinbefore printed consist of true and correct copies of the notices of appeal to the Court of Appeals, the orders and judgments of affirmance appealed from and all the papers upon which the Court below acted in making the orders and judgments of affirmance appealed from, and the whole thereof, now on file in the office of the clerk of the County of New York, in each of the cases.

Certification thereof in pursuance of Section 1353 of the Code of Civil Procedure is hereby waived.

Dated, December 30th, 1911.

AMOS VAN ETTEN,
Attorney for Defendant-Appellant.
E. CROSBY KINDLEBERGER,
Attorney for Plaintiff-Respondent.

559 At a Special Term, Part II, of the Supreme Court, Held in and for the County of New York, at the County Court House, Borough of Manhattan, City of New York, on the 2nd Day of January, 1914.

Present: Hon. John Ford, Justice.

Action No. I.

PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
against
CORNELL STEAMBOAT COMPANY, Defendant.

The above named defendant having appealed to the Court of Appeals of the State of New York from the final judgment entered and

filed in the office of the Clerk of the County of New York on the 8th day of November, 1911, whereby it was adjudged that the judgment entered in this action on the 6th day of September, 1910, in favor of the plaintiff and against the defendant for $4,146.58, be affirmed and further adjudged that plaintiff recover of the defendant the sum of $143.57 costs, and the said appeal having been duly argued at the Court of Appeals and after due deliberation, the Court of Appeals having ordered and adjudged that the said judgment so appealed from as aforesaid be affirmed with costs, and having further ordered and adjudged that the proceedings therein be remitted to the Supreme Court, there to be proceeded upon according to law, now on reading and filing the remittitur from the Court of Appeals
560 herein and upon motion of E. Crosby Kindleberger, Attorney for plaintiff, it is

Ordered that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this court.

Enter:

J. F., *J. S. C.*

F. J. G.

560½ [Endorsed:] Supreme Court, New York County. Phœnix Construction Company, Plaintiff, against Cornell Steamboat Company, Defendant. Action No. 1. Order on remittitur and notice of entry. E. Crosby Kindleberger, Attorney for plaintiff, 2 Rector Street, Borough of Manhattan, New York City. To Amos Van Etten, Esq.

SIR: Please take notice that an order, of which the within is a copy, was duly entered in the office of the Clerk of the County of New York on the second day of January, 1914.

Dated, January 3, 1914.

Yours, etc.,

E. CROSBY KINDLEBERGER,
Attorney for Plaintiff.

Office and P. O. Address, 2 Rector St., Borough of Manhattan, New York City.

To Amos Van Etten, Esq., Rondout, N. Y., Attorney for Defendant.

561 At a Special Term, Part II, of the Supreme Court, Held in and for the County of New York, at the County Court House, Borough of Manhattan, City of New York, on the 2nd Day of January, 1914.

Present: Hon. John Ford, Justice.

Action No. II.

PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
against
CORNELL STEAMBOAT COMPANY, Defendant.

The above named defendant having appealed to the Court of Appeals of the State of New York from the final judgment entered and filed in the office of the Clerk of the County of New York on the 8th day of November, 1911, whereby it was adjudged that the judgment entered in this action on the 6th day of September, 1910, in favor of the plaintiff and against the defendant for $4,432.52, be affirmed, and the said appeal having been duly argued at the Court of Appeals, and after due deliberation, the Court of Appeals having ordered and adjudged that the said judgment so appealed from as aforesaid be affirmed with costs, and having further ordered and adjudged that the proceedings therein be remitted to the Supreme Court, there to be proceeded upon according to law, now on reading and filing the remittitur from the Court of Appeals herein and upon motion of E. Crosby Kindleberger, Attorney for plaintiff, it is

562 Ordered that the said order and judgment of the Court of Appeals be ans the same hereby are made the order and judgment of this court.

Enter:

J. F., *J. S. C.*

F. J. G.

562½ [Endorsed:] Supreme Court, New York County. Phœnix Construction Company, Plaintiff, against Cornell Steamboat Company, Defendant. Action No. II. Order on remittitur and notice of entry. E. Crosby Kindleberger, Attorney for plaintiff, 2 Rector Street, Borough of Manhattan, New York City. To Amos Van Etten, Esq.

SIR: Please take notice that an order, of which the within is a copy was duly entered in the office of the Clerk of the County of New York on the second day of January, 1914.

Dated January 3, 1914.

Yours, etc.,

E. CROSBY KINDLEBERGER,
Attorney for Plaintiff.

Office and P. O. Address, 2 Rector St., Borough of Manhattan, New York City.

To Amos Van Etten, Esq., Attorney for defendant, Rondout, N. Y.

563 At a Special Term, Part II, of the Supreme Court, Held in and for the County of New York, at the County Court House, Borough of Manhattan, City of New York, on the 2nd Day of January, 1914.

Present: Hon. John Ford, Justice.

Action No. III.

PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
against
CORNELL STEAMBOAT COMPANY, Defendant.

The above named defendant having appealed to the Court of Appeals of the State of New York from the final judgment entered and filed in the office of the Clerk of the County of New York on the 8th day of November, 1911, whereby it was adjudged that the judgment entered in this action on the 6th day of September, 1910, in favor of the plaintiff and against the defendant for $9,908.36 be affirmed and further adjudged that plaintiff recover of the defendant the sum of $152.87 costs, and the said appeal having been duly argued at the Court of Appeals and after due deliberation, the Court of Appeals having ordered and adjudged that the said judgment so appealed from as aforesaid be affirmed with costs, and having further ordered and adjudged that the proceedings therein be remitted to the Supreme Court, there to be proceeded upon according to law, now on reading and filing the remittitur from the Court of Appeals
564 herein and upon motion of E. Crosby Kindleberger, Attorney for plaintiff, it is

Ordered that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court.

Enter:

F. J. G. J. F., *J. S. C.*

564½ SIR: Please take notice that an order, of which the within is a copy, was duly entered in the office of the Clerk of the County of New York on the second day of January, 1914.

Dated, January 3, 1914.

Yours, etc.,

E. CROSBY KINDLEBERGER,
Attorney for Plaintiff.

Office and P. O. Address, 2 Rector Street, Borough of Manhattan, New York City.

To Amos Van Etten, Esq., Attorney for defendant, Rondout, N. Y.

[Endorsed:] Supreme Court, New York County. Phœnix Construction Company, Plaintiff, against Cornell Steamboat Company, Defendant. Action No. III. Order on remittitur and

Notice of entry. E. Crosby Kindleberger, Attorney for plaintiff, 2 Rector Street, Borough of Manhattan, New York City. To Amos Van Etten, Esq.

565 Supreme Court, New York County.

Action No. I.

PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
against
CORNELL STEAMBOAT COMPANY, Defendant.

Costs of Plaintiff After Affirmance of Judgment by Court of Appeals.

Costs.

Costs before argument in Court of Appeals	$30	
Costs for argument	60	
Term fees, Court of Appeals	[10]*	
[On margin:] Off.		
Costs		$100.

Disbursements.

Clerk's fees, entering judgment	.50	
" " on remittitur	2.00	
Expressage on remittitur and briefs	.30	
Printing brief for respondent	58.10	
Disbursements		60.90
Total		$160.90
		10
		150.90

[Taxed Jan. 8/14.]*

I hereby certify that I have adjusted this bill of costs at $150.90 Jan. 8, 1914, on appearance.

WM. F. SCHNEIDER, *Clerk.*

STATE OF NEW YORK,
County of New York, ss:

E. Crosby Kindleberger, being duly sworn deposes and says: That he is the attorney for the plaintiff in the above entitled action and that the foregoing disbursements have actually been made or will necessarily be incurred in this action, and are reasonable in amount.

E. CROSBY KINDLEBERGER.

[* Words and figures enclosed in brackets erased in copy.]

Sworn to before me this 3rd day of January, 1914.
CLARA M. O'FARRELL
Commissioner of Deeds, City of New York, Residing in the Borough of 8.

Certificates filed N. Y. Co., Clerk's No. —.
Kings Co. Reg. No. —.
" " Clerk's No. —.
Queens " " No. —.

F. J. G.

565½ SIR: Please take notice that a bill of costs of which the within is a copy, will be duly presented to the Clerk of the County of New York for taxation on the 6th day of January, 1914, at 9:30 o'clock in the forenoon of that day.

Dated, New York, January 3, 1914.

Yours, etc.,

E. CROSBY KINDLEBERGER,
Attorney for Plaintiff.

Office and P. O. Address, 2 Rector Street, Borough of Manhattan, New York City.

To Amos Van Etten, Esq., Attorney for defendant, Rondout, N. Y.

[Endorsed:] Supreme Court, New York County. Phœnix Construction Company, Plaintiff, against Cornell Steamboat Company, Defendant. Action No. I. Bill of costs and notice of Taxation. E. Crosby Kindleberger, Attorney for plaintiff, 2 Rector Street, Borough of Manhattan, New York City. To Amos Van Etten, Esq.

566 Supreme Court, New York County.

Action No. II.

PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
against
CORNELL STEAMBOAT COMPANY, Defendant.

Costs of Plaintiff After Affirmance of Judgment by Court of Appeals.

Costs.

Costs before argument in Court of Appeals.....	$30
Costs for argument.....	60
Term fees, Court of Appeals.....	[10]*
[On margin:] Off.	
Costs	$100.

[*Figures in brackets erased in copy.]

Disbursements.

Clerk's fees, entering judgment	.50	
" " on remittitur	2.00	
Expressage on remittitur and briefs	.30	
Printing brief for respondent	10.80	
Disbursements		13.60
Total		[$113.60]* 10
		103.60

[Taxed Jan. 8/14.]*

I hereby certify that I have adjusted this bill of costs at 103.60, Jan. 8, 1913 on appearance.

WM. F. SCHNEIDER, *Clerk.*

Defendant's attorney objects to the taxation of costs of action II and action III except disbursements.

WM. F. SCHNEIDER, *Clerk.*

STATE OF NEW YORK,
County of New York, ss:

E. Crosby Kindleberger, being duly sworn deposes and says: That he is the attorney for the plaintiff in the above entitled action and that the foregoing disbursements have actually been made or will necessarily be incurred in this action, and are reasonable in amount.

E. CROSBY KINDLEBERGER.

Sworn to before me this 3rd day of January, 1914.

CLARA M. O'FARRELL,
Commissioner of Deeds, City of New York,
Residing in the Borough of Man.

Certificates filed N. Y. Co., Clerk's No. 8.
Kings Co. Reg. No. —.
" " Clerk's No. —.
Queens " " No. —.

F. J. G.

567 SIR: Please take notice that a bill of costs of which the within is a copy, will be duly presented to the Clerk of the County of New York for taxation on the 6th day of January, 1914, at 9:30 o'clock in the forenoon of that day.

Dated, New York, January 3, 1914.

Yours, etc.,

E. CROSBY KINDLEBERGER,
Attorney for Plaintiff.

Office and P. O. Address, 2 Rector Street, Borough of Manhattan, New York City.

To Amos Van Etten, Esq., Attorney for defendant, Rondout, N. Y.

[* Words and figures enclosed in brackets erased in copy.]

[Endorsed:] Supreme Court, New York County. Phœnix Construction Company, Plaintiff, against Cornell Steamboat Company, Defendant. Action No. II. Bill of costs and notice of Taxation. E. Crosby Kindleberger, Attorney for plaintiff, 2 Rector Street, Borough of Manhattan, New York City. To Amos Van Etten, Esq.

568 Supreme Court, New York County.

Action No. III.

PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
against
CORNELL STEAMBOAT COMPANY, Defendant.

Costs of Plaintiff After Affirmance of Judgment by Court of Appeals.

Costs.

Costs before argument in Court of Appeals	$30	
Costs for argument	60	
Term fees, Court of Appeals	[10]*	
[On margin:] Off.		
Costs		$100.

Disbursements.

Clerk's fees, entering judgment	.50	
" " on remittitur	2.00	
Expressage on remittitur and briefs	.30	
Printing brief for respondent	25.75	
Disbursements		28.55
Total		$128.55
		10
		118.55

[Taxed Jan. 8/14.]*

I hereby certify that I have adjusted this bill of costs at $118.55, Jan. 8, 1914, on appearance.

WM. F. SCHNEIDER, *Clerk.*

Defendant's attorney objects to the taxation of costs of action II and action III except disbursements.

WM. F. SCHNEIDER, *Clerk.*

[* Words and figures enclosed in brackets erased in copy.]

STATE OF NEW YORK,
County of New York, ss:

E. Crosby Kindleberger, being duly sworn deposes and says: That he is the attorney for the plaintiff in the above entitled action and that the foregoing disbursements have actually been made or will necessarily be incurred in this action, and are reasonable in amount.

E. CROSBY KINDLEBERGER.

Sworn to before me this 3rd day of January, 1914.

CLARA M. O'FARRELL,
Commissioner of Deeds, City of New York,
Residing in the Borough of Man.

Certificates filed N. Y. Co., Clerk's No. 8.
Kings Co. Reg. No. —.
" " Clerk's No. —.
Queens " " No. —.

F. J. G.

568 SIR: Please take notice that a bill of costs of which the within is a copy, will be duly presented to the Clerk of the County of New York for taxation on the 6th day of January, 1914, at 9:30 o'clock in the forenoon of that day.

Dated, New York, January 3, 1914.

Yours, etc.,

E. CROSBY KINDLEBERGER,
Attorney for Plaintiff.

Office and P. O. Address, 2 Rector Street, Borough of Manhattan, New York City.

To Amos Van Etten, Esq., Attorney for defendant, Rondout, N. Y.

[Endorsed:] Supreme Court, New York County. Phœnix Construction Company, Plaintiff, against Cornell Steamboat Company, Defendant. Action No. III. Bill of costs and notice of taxation. E. Crosby Kindleberger, Attorney for plaintiff, 2 Rector Street, Borough of Manhattan, New York City. To Amos Van Etten, Esq.

569 Supreme Court, New York County.

PHOENIX CONSTRUCTION COMPANY, Plaintiff,
against
CORNELL STEAMBOAT COMPANY, Defendant.

Judgment on Remittitur.

Action No. III.

Defendant's attorney objects to the taxation of costs of action No. 2 and action No. III on ground that pl'ff is only entitled to one bill of costs.

WM. F. SCHNEIDER, *Clerk.*

A judgment in this action in favor of the plaintiff and against the defendant having been rendered in this court on the 6th day of September, 1910, in the sum of $9,908.36, and the defendant having appealed to the Appellate Division of this Court for the First Department, and the said judgment having been affirmed in all things by this court at said Appellate Division, and Judgment of Affirmance having been rendered thereon the 8th day of November, 1911, and that the plaintiff recover against the defendant $152.87, costs of said appeal; and the defendant having appealed therefrom to the Court of Appeals; and the said Court of Appeals having sent hither its remittitur filed herein the 2nd day of January, 1914, by which it appears that the said Court of Appeals has affirmed the said judgment in all things with costs and has given judgment accordingly, and has remitted the judgment of said Court of Appeals to this court to be enforced according to law; and this court having by an order duly entered herein the 2nd day of January, 1914, ordered that said judgment be made the judgment of this court, and the plaintiff's costs having been duly taxed at the sum of One hundred and Eighteen 55/100 ($118.55/100) Dollars, now on motion of E. Crosby Kindleberger, plaintiff's Attorney, it is

570 Adjudged that the said order and judgment of the Court of Appeals be and the same are hereby the order and judgment of this Court, and it is further

Adjudged that the plaintiff, Phoenix Construction Company, recover of the defendant, Cornell Steamboat Company, the sum of One hundred and Eighteen 55/100 ($118.55/100) Dollars, costs as taxed.

Judgment signed and entered this 8 day of January, 1914.

[Seal County Clerk.]

WM. F. SCHNEIDER, *Clerk.*

F. J. G.

570½ SIR: Please take notice that a Judgment, of which the within is a copy, was duly entered in the office of the Clerk of the County of New York, on the 8th day of January, 1914. Dated, January 8, 1914.

Yours, etc.,

E. CROSBY KINDLEBERGER,
Attorney for Plaintiff.

Office and P. O. Address, 2 Rector St., Borough of Manhattan, New York City.

To Amos Van Etten, Esq., Attorney for defendant, Rondout, N. Y.

[Endorsed:] Supreme Court, New York County. County Clerk's Index, No. 171, 1910. Phoenix Construction Company, Plaintiff, against Cornell Steamboat Company, Defendant. Action No. III. Judgment on Remittitur and Notice of Entry. E. Crosby Kindleberger, Attorney for plaintiff, 2 Rector Street, Borough of Manhattan, New York City. Rec'd 1/9/'14. To Amos Van Etten, Esq.

571 Supreme Court, New York County.

PHOENIX CONSTRUCTION COMPANY, Plaintiff,
against
CORNELL STEAMBOAT COMPANY, Defendant.

Judgment on Remittitur.

Action No. II.

Defendant's attorney objects to the taxation of costs of action II and action III on ground that pl'ff is only entitled to one bill of costs.

WM. F. SCHNEIDER, *Clerk.*

A judgment in this action in favor of the plaintiff and against the defendant having been rendered in this court on the 6th day of September, 1910, in the sum of $4,432.52, and the defendant having appealed to the Appellate Division of this Court for the First Department, and the said judgment having been affirmed in all things by this court at said Appellate Division, and Judgment of Affirmance having been rendered thereon the 8th day of November, 1911; and the defendant having appealed therefrom to the Court of Appeals; and the said Court of Appeals having sent hither its remittitur, filed herein the 2nd day of January, 1914, by which it appears that the said Court of Appeals has affirmed the said judgment in all things with costs and has given judgment accordingly, and has remitted the judgment of said Court of Appeals to this court to be enforced according to law; and this Court having by an order duly entered herein the 2nd day of January, 1914, ordered that said judgment be made the judgment of this court, and the plaintiff's costs having been duly taxed at the sum of One hundred and three 60/100 ($103 60/100) Dollars, now on motion of E. Crosby Kindleberger, plaintiff's attorney, it is

572 Adjudged that the said order and judgment of the Court of Appeals be and the same are hereby the order and judgment of this Court, and it is further

Adjudged that the plaintiff, Phoenix Construction Company, recover of the defendant, Cornell Steamboat Company, the sum of One hundred & three 60/100 ($103 60/100) Dollars, costs as taxed.

Judgment signed and entered this 8 day of January, 1914.

[Seal County Clerk.]

WM. F. SCHNEIDER, *Clerk.*

F. J. G.

572½ SIR: Please take notice that a Judgment, of which the within is a copy, was duly entered in the office of the Clerk

of the County of New York, on the 8th day of January, 1914.
Dated, January 8, 1914.

Yours, etc.,

E. CROSBY KINDLEBERGER,
Attorney for Plaintiff.

Office and P. O. Address, 2 Rector St., Borough of Manhattan, New York City.

To Amos Van Etten, Esq., Attorney for defendant, Rondout, N. Y.

[Endorsed:] Supreme Court, New York County. County Clerk's Index, No. 171, 1910. Phoenix Construction Company, Plaintiff, against Cornell Steamboat Company, Defendant. Action No. II. Judgment on Remittitur and notice of Entry. E. Crosby Kindleberger, Attorney for plaintiff, 2 Rector Street, Borough of Manhattan, New York City. Rec'd 1/9/'14. To Amos Van Etten, Esq.

573 Supreme Court, New York County.

PHOENIX CONSTRUCTION COMPANY, Plaintiff,
against
CORNELL STEAMBOAT COMPANY, Defendant.

Judgment on Remittitur.

Action No. I.

Defendant's attorney objects to the taxation of costs of action II and action III on ground that pl'ff is only entitled to one bill of costs.

W. F. SCHNEIDER, *Clerk.*

A judgment in this action in favor of the plaintiff and against the defendant having been rendered in this court on the 6th day of September, 1910, in the sum of $4,146.58, and the defendant having appealed to the Appellate Division of this Court for the First Department, and the said judgment having been affirmed in all things by this court at said Appellate Division, and Judgment of Affirmance having been rendered thereon the 8th day of November, 1911, and that the plaintiff recover against the defendant $143.50, costs of said appeal; and the defendant having appealed therefrom to the Court of Appeals; and the said Court of Appeals having sent hither its remittitur filed herein the 2nd day of January, 1914, by which it appears that the said Court of Appeals has affirmed the said judgment in all things with costs and has given judgment accordingly, and has remitted the judgment of said Court of Appeals to this court to be enforced according to law; and this court having by an order duly entered herein the 2nd day of January, 1914, ordered that said judgment be made the judgment of

this court, and the plaintiff's costs having been duly taxed at the sum of One hundred and Fifty 90/100 ($150 90/100) Dollars, now on motion of E. Crosby Kindleberger, plaintiff's attorney, it is

574 Adjudged that the said order and judgment of the Court of Appeals be and the same are hereby the order and judgment of this Court, and it is further

Adjudged that the plaintiff, Phoenix Construction Company, recover of the defendant, Cornell Steamboat Company, the sum of One hundred and Fifty 90/100 ($150 90/100) Dollars, costs as taxed.

Judgment signed and entered this 8 day of January, 1914.

[Seal County Clerk.]

WM. F. SCHNEIDER, *Clerk.*

F. J. G.

574½ SIR: Please take notice that a Judgment, of which the within is a copy, was duly entered in the office of the Clerk of the County of New York, on the 8th day of January, 1914. Dated, January 8, 1914.

Yours, etc.,

E. CROSBY KINDLEBERGER,
Attorney for Plaintiff.

Office and P. O. Address, 2 Rector St., Borough of Manhattan, New York City.

To Amos Van Etten, Esq., Attorney for defendant, Rondout, N. Y.

[Endorsed:] Supreme Court, New York County. County Clerk's Index, No. 171, 1910. Phoenix Construction Company, Plaintiff, against Cornell Steamboat Company, Defendant. Action No. I. Judgment on Remittitur & Notice of Entry. E. Crosby Kindleberger, Attorney for plaintiff, 2 Rector Street, Borough of Manhattan, New York City. Rec'd 1/9/'14. To Amos Van Etten, Esq.

575 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court on a remittitur from the Court of Appeals of the State of New York, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Phœnix Construction Company, plaintiff, and Cornell Steamboat Company, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant

to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title right, privilege, immunity, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission a manifest
576 error had happened, to the great damage of the said defendant as is said and appears by its complaint. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 7th day of February, in the year of our Lord one thousand nine hundred and fourteen.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk of the United States District Court,
Southern District of New York.

The above writ is allowed by:

WILLARD BARTLETT,
Chief Judge of the Court of Appeals
of the State of New York.

F. J. G.

576½ [Endorsed:] Supreme Court of the United States. Cornell Steamboat Company, Plaintiff-in-Error, against Phœnix Construction Company, Defendant-in-Error. Action No. 2. Writ of Error. Amos Van Etten, Attorney for Plaintiff-in-Error, Kingston, N. Y. Copy Rec'd Feb. 13 14. E. Crosby Kindleberger, att'y for Def. in error. Convers & Kirlin, 27 William Street, New York. Received Feb'y 16, 1914. Wm. F. Schneider, clerk.

577 UNITED STATES OF AMERICA, *ss.:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court on a

remmit-itur from the Court of Appeals of the State of New York, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Phœnix Construction Company, plaintiff, and Cornell Steamboat Company, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the
578 United States, and the decision was against the title right, privilege, immunity or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error had happened, to the great damage of the said defendant as is said and appears by its complaint. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of
579 the United States, this 7th day of February, in the year of our Lord one thousand nine hundred and fourteen.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, Jr.,
Clerk of the United States District Court,
Southern District of New York.

The above writ is allowed by
WILLARD BARTLETT,
Chief Judge of the Court of Appeals
of the State of New York.

F. J. G.

579½ [Endorsed:] Supreme Court of the United States. Cornell Steamboat Company, Plaintiff-in-Error, against Phœnix Construction Company, Defendant-in-Error. Action No. 3. Writ of Error. Amos Van Etten, Attorney for Plaintiff-in-Error, Kingston, N. Y. Copy Rec'd, February 13/14. E. Crosby Kindleberger, attorney for Def.-in-error. Convers & Kirlin, 27 William Street, New York. Received Feb'y 16, 1914. Wm. F. Schneider, clerk.

580 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court on a remittitur from the Court of Appeals of the State of New York, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Phœnix Construction Company, plaintiff, and Cornell Steamboat Company, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title right, privilege, immunity or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error
581 had happened, to the great damage of the said defendant as is said and appears by its complaint. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 7th day of Feb'y, in the year of our Lord one thousand nine hundred and fourteen.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk of the United States District Court,
Southern District of New York.

The above writ is allowed by:

WILLARD BARTLETT,
Chief Judge of the Court of Appeals
of the State of New York.

F. J. G.

581½ [Endorsed:] Received Feb'y 16, 1914. Wm. F. Schneider, Clerk. Supreme Court of the United States. Cornell Steamboat Company, plaintiff-in-error, against Phœnix Construction Company, defendant-in-error. Action No. 1. Writ of Error. Amos Van Etten, Attorney for plaintiff-in-error, Kingston, N. Y. Copy rec'd February 13/14. E. Crosby Kindleberger, Att'y for Def. in error. Convers & Kirlin, 27 William Street, New York.

582 New York Court of Appeals.

Action No. 1.

CORNELL STEAMBOAT COMPANY, Plaintiff-in-Error,
against
PHŒNIX CONSTRUCTION COMPANY, Defendant-in-Error.

Petition for Writ of Error.

To the Honorable Willard Bartlett, Chief Judge of the New York Court of Appeals:

The Petition of Cornell Steamboat Company, a corporation duly organized and existing under the laws of the State of New York, the defendant herein, respectfully shows to this Court:

That on the 17th day of May, 1909, the plaintiff, Phœnix Construction Company, commenced an action at law against the defendant, Cornell Steamboat Company, for the recovery of damages arising out of a collision, in July, 1908, between canal boats in tow of the defendant's tug boats and certain structures or borings which were used for drilling rock underneath the bottom of the river in order to determine a suitable position for a tunnel through which water was to be carried from the western side to the eastern side of the Hudson.

583 The complaint averred that the accident was due to faulty navigation by the defendant's servants. The answer of the defendant denied the charges of fault. The defendant also alleged and contended throughout the proceedings in the State Courts, that the structures of the plaintiff which were hit and damaged by the defendant's tug or tow boats in tow, were unlawfully placed in the navigable waters of the Hudson River, and that at the time of said collision were unlawfully, unnecessarily and improperly interfering with navigation upon the Hudson River, such river being one of the navigable streams of the United States, in the State of New York, and invoked the provisions of the Act of Congress of March 3, 1899, Vol. 2, Supp. R. S. p. 994, U. S. Comp. Stat. 1901, pp. 35-41, which provides that the creation of any obstruction in the navigable waters of the United States, except in rivers or other water ways, the navigable portions of which lie wholly within the limits of a single state, is prohibited unless it is affirmatively authorized by Congress, to obtain immunity for any damage caused to the plaintiff on account of the collision hereinbefore described.

The referee before whom the trial of issues *were* had decided in favor of the plaintiff and denied to the defendant the immunity claimed by it under the United States statute. The judgment entered for the plaintiff upon the referee's decision has been affirmed by the Appellate Division, First Judicial Department, and the
584 Court of Appeals. The said Court of Appeals of the State of New York is the highest Court of the said State of New York in which a decision in this suit could be had.

That on January 8, 1914, a judgment of the Supreme Court of the State of New York, was entered in the County of New York in the said state upon the remittitur of the Court of Appeals, affirming with costs a judgment of the Supreme Court entered in said County against your petitioner, and in favor of the plaintiff, for the sum of $4,146.58.

Inasmuch as certain errors appear in the judgment entered upon the remittitur of the Court of Appeals and in the proceedings had prior thereto, as recited in the annexed assignments of error, the plaintiff in error prays for the allowance of a writ of error returnable in the Supreme Court of the United States, and a citation.

And so it will ever pray, etc.

Dated February 2nd, 1914.

CORNELL STEAMBOAT COMPANY,
By FREDK. COYKENDALL, *President.*
AMOS VAN ETTEN,
Attorney for Pl'ff-in-Error.

Sealed and Delivered in the Presence of:
M. BIXBY.

J. PARKER KIRLIN, *Counsel.*

F. J. G.

585 STATE OF NEW YORK,
County of New York, ss:

Fredk. Coykendall being duly sworn, deposes and says, that he is the President of the Cornell Steamboat Company, the petitioner above named. That he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge.

Deponent further says that the reason this verification is not made by the petitioner is that it is a corporation.

FREDK. COYKENDALL.

Sworn to before me, this 2d day of February, 1914.

[Seal Morris Bixby, Notary Public, Westchester County, N. Y.]

M. BIXBY,
Notary Public, Notary Public, *Westchester Co.*

Certificate filed in New York Co.; Register No. 4220; N. Y. County No. —.

F. J. G.

585½ [Endorsed:] New York Court of Appeals. Cornell Steamboat Company, Plaintiff-in-Error, vs. Phœnix Construction Company, Defendant-in-Error. Action No. 1. Petition for Writ of Error. Amos Van Etten, Attorney for Plaintiff-in-Error, Kingston, N. Y. Copy Received February 14, 1914. E. Crosby Kindleberger, by —, Attorney for Def't in Error. Convers & Kirlin, 27 William Street, New York.

586 New York Court of Appeals.

Action No. 2.

CORNELL STEAMBOAT COMPANY, Plaintiff-in-Error,
against
PHŒNIX CONSTRUCTION COMPANY, Defendant-in-Error.

Petition for Writ of Error.

To the Honorable Willard Bartlett, Chief Judge of the New York Court of Appeals:

The Petition of Cornell Steamboat Company, a corporation duly organized and existing under the laws of the State of New York, the defendant herein, respectfully shows to this Court:

That on the 17th day of May, 1909, the plaintiff, Phœnix Construction Company, commenced an action at law against the defendant, Cornell Steamboat Company, for the recovery of damages arising out of a collision, in July, 1908, between canal boats in tow of the defendant's tug boats and certain structures or borings which were used for drilling rock underneath the bottom of the river in order to determine a suitable position for a tunnel through which water was to be carried from the western side to the eastern side of the Hudson.

587 & 588 The complaint averred that the accident was due to faulty navigation by the defendant's servants. The answer of the defendant denied the charges of fault. The defendant also alleged and contended throughout the proceedings in the State Courts, that the structures of the plaintiff which were hit and damaged by the defendant's tug or tow boats in tow, were unlawfully placed in the navigable waters of the Hudson River, and that at the time of said collision were unlawfully, unnecessarily and improperly interfering with navigation upon the Hudson River, such river being one of the navigable streams of the United States in the State of New York, and invoked the provisions of the Act of Congress of March 3, 1899, Vol. 2, Supp. R. S. p. 994, U. S. Comp. Stat. 1901, pp. 35-41, which provides that the creation of any obstruction in the navigable waters of the United States, except in rivers or other water ways, the navigable portions of which lie wholly within the limits of a single state, is prohibited unless it is affirmatively authorized by Congress to obtain immunity for any damage caused to the plaintiff on account of the collision hereinbefore described.

The referee before whom the trial of issues *were* had decided in favor of the plaintiff and denied to the defendant the immunity claimed by it under the United States statute. The judgment entered for the plaintiff upon the referee's decision has been affirmed by the Appellate Division, First Judicial Department, and
589 the Court of Appeals. The said Court of Appeals of the State of New York is the highest Court of the said State of New York in which a decision in this suit could be had.

That on January 8, 1914, a judgment of the Supreme Court of the State of New York, was entered in the County of New York in the said state upon the remittitur of the Court of Appeals, affirming with costs a judgment of the Supreme Court entered in said County against your petitioner, and in favor of the plaintiff for the sum of $4,432.52.

Inasmuch as certain errors appear in the judgment entered upon the remittitur of the Court of Appeals and in the proceedings had prior thereto, as recited in the annexed assignments of error, the plaintiff-in-error prays for the allowance of a writ of error returnable in the Supreme Court of the United States, and a citation.

And so it will ever pray, etc.

Dated February 2nd, 1914.

CORNELL STEAMBOAT COMPANY,
By FREDK. COYKENDALL, *President.*
AMOS VAN ETTEN,
Attorney for Pl'ff-in-Error.

Sealed and Delivered in the Presence of:
M. BIXBY.

J. PARKER KIRLIN, *Counsel.*

F. J. G.

590 STATE OF NEW YORK,
County of New York, ss:

Fredk. Coykendall being duly sworn, deposes and says, that he is the President of the Cornell Steamboat Company, the petitioner above named. That he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge.

Deponent further says that the reason this verification is not made by the petitioner is that it is a corporation.

FREDK. COYKENDALL.

Sworn to before me, this 2d day of [January,]* February, 1914. M. B.

[Seal Morris Bixby, Notary Public, Westchester County, N. Y.]

M. BIXBY,
Notary Public, Notary Public, *Westchester Co.*

Certificate filed in New York Co. Register No. 4220 N. Y. County No. 60.

F. J. G.

[* Words in brackets erased in copy.]

590½ [Endorsed:] New York Court of Appeals. Cornell Steamboat Company, Plaintiff-in-Error, vs. Phœnix Construction Company, Defendant-in-Error. Action No. 2. Petition for Writ of Error. Amos Van Etten, Attorney for Plaintiff-in-Error, Kingston, N. Y. Copy Received February 14, 1914. E. Crosby Kindleberger, by ——, Attorney for Def't in Error. Convers & Kirlin, 27 William Street, New York.

591 New York Court of Appeals.

Action No. 3.

CORNELL STEAMBOAT COMPANY, Plaintiff-in-Error,
against
PHŒNIX CONSTRUCTION COMPANY, Defendant-in-Error.

Petition for Writ of Error.

To the Honorable Willard Bartlett, Chief Judge of the New York Court of Appeals:

The petition of Cornell Steamboat Company, a corporation duly organized and existing under the laws of the State of New York, the defendant herein, respectfully shows to this Court:

That on the 17th day of May, 1909, the plaintiff, Phœnix Construction Company, commenced an action at law against the defendant, Cornell Steamboat Company, for the recovery of damages arising out of a collision, in July, 1908, between canal boats in tow of the defendant's tug boats and certain structures of borings which were used for drilling rock underneath the bottom of the river in order to determine a suitable position for a tunnel through which water was to be carried from the western side to the eastern side of the Hudson.

592 The complainant averred that the accident was due to faulty navigation by the defendant's servants. The answer of the defendant denied the charges of fault. This defendant also alleged and contended throughout the proceedings in the State Courts, that the structures of the plaintiff which were hit and damaged by the defendant's tug or tow boats in tow, were unlawfully placed in the navigable waters of the Hudson River, and that at the time of said collision were unlawfully, unnecessarily and improperly interfering with navigation upon the Hudson River, such river being one of the navigable streams of the United States in the State of New York, and invoked the provisions of the Act of Congress of March 3, 1899, Vol. 2, Supp. R. S. p. 994, U. S. Comp. Stat. 1901, pp. 35-41, which provides that the creation of any obstruction in the navigable waters of the United States, except in rivers or other water ways, the navigable portions of which lie wholly within the limits of a single state, is prohibited unless it is affirmatively authorized by Congress, to obtain immunity for any damage caused to the plaintiff on account of the collision hereinbefore described.

The referee before whom the trial of issues *were* had decided in favor of the plaintiff and denied to the defendant the immunity claimed by it under the United States statute. The judgment entered for the plaintiff upon the referee's decision has been affirmed by the Appellate Division, First Judicial Department, and
593 the Court of Appeals. The said Court of Appeals of the State of New York is the highest Court of the said State of New York in which a decision in this suit could be had.

That on January 8, 1914, a judgment of the Supreme Court of the State of New York, was entered in the County of New York in the said state upon the remittitur of the Court of Appeals, affirming with costs a judgment of the Supreme Court entered in said County against your petitioner, and in favor of the plaintiff for the sum of $9,908.36.

Inasmuch as certain errors appear in the judgment entered upon the remittitur of the Court of Appeals and in the proceedings had prior thereto, as recited in the annexed assignments of error, the plaintiff in error prays for the allowance of a writ of error returnable in the Supreme Court of the United States, and a citation.

And so it will ever pray, etc.

Dated [January]* February 2nd, 1914.

CORNELL STEAMBOAT COMPANY,
By FREDK. COYKENDALL, *President*,
AMOS VAN ETTEN,
Attorney for Plaintiff-in-Error.

Sealed and delivered in the presence of—
M. BIXBY.

J. PARKER KIRLIN, *Counsel*.

F. J. G.

594 STATE OF NEW YORK,
County of New York, ss:

Fredk. Coykendall being duly sworn, deposes and says, that he is the President of the Cornell Steamboat Company, the petitioner above named. That he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge.

Deponent further says that the reason this verification is not made by the petitioner is that it is a corporation.

FREDK. COYKENDALL.

Sworn to before me, this 2nd day of [January,]* February 1914. M. B.
[Seal Morris Bixby, Notary Public, Westchester County, N. Y.]

M. BIXBY,
Notary Public, Notary Public, *Westchester Co.*

Certificate filed in New York Co. Register No. 4220 N. Y. County No. 60.

F. J. G.

[* Words in brackets erased in copy.]

594½ [Endorsed:] New York Court of Appeals. Cornell Steamboat Company, Plaintiff-in-Error, against Phœnix Construction Company, Defendant-in-Error. Action No. 3. Petition for Writ of Error. Amos Van Etten, Attorney for Plaintiff-in-Error, Kingston, N. Y. Copy Received February 14, 1914, E. Crosby Kindleberger, by ——, Attorney for Def't in Error. Convers & Kirlin, 27 William Street, New York.

595 Supreme Court of the United States.

Action No. 1.

CORNELL STEAMBOAT COMPANY, Plaintiff-in-Error,
against
PHŒNIX CONSTRUCTION COMPANY, Defendant-in-Error.

Assignments of Error.

The Plaintiff-in-error respectfully submits that in the record, proceedings, decisions and final judgment of the Supreme Court of the State of New York in the above entitled matter, there is manifest error, to wit:

1st. That the Supreme Court of the State of New York and the Court of Appeals of said State in affirming the judgment of the Supreme Court erred in holding and deciding that the structures or borings of the plaintiff, erected in the Hudson River, opposite Storm King, were not unlawful obstructions of the channel of the Hudson River, in violation of Act of Congress of March 3, 1899, U. S. Comp. Stat. 1901, pp. 35-41, and by said decision was drawn in question an immunity specially set up and claimed under a statute of the United States, and the immunity thus set up and claimed by the defendant was denied.

2nd. That the Supreme Court of the State of New York and the Court of Appeals of said State in affirming the judgment of the Supreme Court erred in holding and deciding that the defendant is liable to the plaintiff for damages to structures or borings
596 in the Hudson River belonging to the plaintiff, caused by a collision in July, 1909, between canal boats in tow of defendant's tug and the structures or borings, in violation of Act of Congress of March 3, 1899, U. S. Comp. Stat. 1901, pp. 35-41, and by said decision, was drawn in question an immunity specially set up and claimed under a statute of the United States, and the immunity thus set up and claimed by the defendant was denied.

3rd. That the Supreme Court of the State of New York and the Court of Appeals of said State, in affirming the judgment of the Supreme Court erred in holding and deciding that the plaintiff or Board of Water Supply of the City of New York had authority, pursuant to Act of Congress of March 3, 1899 and U. S. Comp. Stat. 1901, pp. 35-41, to erect and maintain structures or borings in the channel of the Hudson River, and by said decision was drawn

in question an immunity specially set up and claimed by the defendant herein under a statute of the United States, and the immunity thus set up and claimed was denied.

4th. That the Supreme Court of the State of New York and the Court of Appeals of said State, in affirming the judment of the Supreme Court erred in holding and deciding that the structures or borings erected by the plaintiff in the Hudson River were not obstructions to the navigation of the Hudson River, within the meaning of Act of Congress of March 3, 1899, U. S. Comp. Stat.
597 1901, pp. 35-41, and by said decision was drawn in question an immunity specially set up and claimed by the defendant herein, and the immunity *specially set up and claimed by the defendant herein, and the immunity* thus set up and claimed was denied.

5th. That the Supreme Court of the State of New York and the Court of Appeals of said State, in affirming the judgment of the Supreme Court erred in giving judgment to the plaintiff, the Phœnix Construction Company vs. Cornell Steamboat Company, whereas by the law of the land the said judgment ought to have been given to the said Cornell Steamboat Company against the Phœnix Construction Company, and the said Cornell Steamboat Company prays that the judgment aforesaid may be reversed.

AMOS VAN ETTEN,
Attorney for Pl'ff-in-Error.

J. PARKER KIRLIN, *Counsel.*

F. J. G.

597½ [Endorsed:] Supreme Court of the United States. Cornell Steamboat Company, Plaintiff-in-Error, against Phœnix Construction Company, Defendant-in-Error. Action No. 1. Assignments of Error. Amos Van Etten, Attorney for Plaintiff-in-Error, Kingston, N. Y. Copy Rec'd February 13/14. E. Crosby Kindleberger, Att'y for Def. in Error. Convers & Kirlin, 27 William Street, New York.

598 Supreme Court of the United States.

Action No. 2.

CORNELL STEAMBOAT COMPANY, Plaintiff-in-Error,
against
PHŒNIX CONSTRUCTION COMPANY, Defendant-in-Error.

Assignments of Error.

The Plaintiff-in-error respectfully submits that in the record, proceedings, decisions and final judgment of the Supreme Court of the State of New York in the above entitled matter, there is manifest error, to wit:

1st. That the Supreme Court of the State of New York and the Court of Appeals of said State in affirming the judgment of the Supreme Court erred in holding and deciding that the structures or borings of the plaintiff, erected in the Hudson River, opposite Storm King, were not unlawful obstructions of the channel of the Hudson River, in violation of Act of Congress of March 3, 1899, U. S. Comp. Stat. 1901, pp. 35-41, and by said decision, was drawn in question an immunity specially set up and claimed under a statute of the United States, and the immunity thus set up and claimed by the defendant was denied.

2nd. That the Supreme Court of the State of New York
599 and the Court of Appeals of said State in affirming the judgment of the Supreme Court erred in holding and deciding that the defendant is liable to the plaintiff for damages to structures or borings in the Hudson River belonging to the plaintiff, caused by a collision in July, 1909, between canal boats in tow of defendant's tug and the structures or borings, in violation of Act of Congress of March 3, 1899, U. S. Comp. Stat. 1901, pp. 35-41, and by said decision, was drawn in question an immunity specially set up and claimed under a statute of the United States, and the immunity thus set up and claimed by the defendant was denied.

3rd. That the Supreme Court of the State of New York and the Court of Appeals of said State, in affirming the judgment of the Supreme Court erred in holding and deciding that the plaintiff or Board of Water Supply of the City of New York had authority, pursuant to Act of Congress of March 3, 1899 and U. S. Comp. Stat. 1901, pp. 35-41, to erect and maintain structures or borings in the channel of the Hudson River, and by said decision was drawn in question an immunity specially set up and claimed by the defendant herein under a statute of the United States, and the immunity thus set up and claimed was denied.

4th. That the Supreme Court of the State of New York and the Court of Appeals of said State, in affirming the judgment of the Supreme Court erred in holding and deciding that the structures or borings erected by the plaintiff in the Hudson River were
600 not obstructions to the navigation of the Hudson River, within the meaning of Act of Congress of March 3, 1889, U. S. Comp. Stat. 1901, pp. 35-41, and by said decision was drawn in question an immunity specially set up and claimed by the defendant herein, and the immunity thus set up and claimed was denied.

5th. That the Supreme Court of the State of New York and the Court of Appeals of said State, in affirming the judgment of the Supreme Court erred in giving judgment to the plaintiff, the Phœnix Construction Company vs. Cornell Steamboat Company, whereas by the law of the land the said judgment ought to have been given to the said Cornell Steamboat Company vs. the Phœnix Construction Company, and the said Cornell Steamboat Company prays that the judgment aforesaid may be reversed.

AMOS VAN ETTEN,
Attorney for Pl'ff-in-Error.

J. PARKER KIRLIN, *Counsel.*

F. J. G.

600½ [Endorsed:] Supreme Court of the United States. Cornell Steamboat Company, Plaintiff-in-Error, against Phœnix Construction Company, Defendant-in-Error. Action No. 2. Assignments of error. Amos Van Etten, Attorney for Plaintiff-in-Error, Kingston, N. Y. Copy Rec'd Feb. 13, 1914. E. Crosby Kindleberger, Att'y for Def.-in-Error. Convers & Kirlin, 27 William Street, New York.

601 Supreme Court of the United States.

Action No. 3.

CORNELL STEAMBOAT COMPANY, Plaintiff-in-Error,
against
PHŒNIX CONSTRUCTION COMPANY, Defendant-in-Error.

Assignments of Error.

The plaintiff-in-error respectfully submits that in the record, proceedings, decisions and final judgment of the Supreme Court of the State of New York in the above entitled matter, there is manifest error, to wit:

1st. That the Supreme Court of the State of New York and the Court of Appeals of said State in affirming the judgment of the Supreme Court erred in holding and deciding that the structures of borings of the plaintiff, erected in the Hudson River, opposite Storm King, were not unlawful obstructions of the channel of the Hudson River, in violation of Act of Congress of March 3, 1899, U. S. Comp. Stat. 1901, pp. 35-41, and by said decision was drawn in question an immunity specially set up and claimed under a statute of the United States, and the immunity thus set up and claimed by the defendant was denied.

602 2nd. That the Supreme Court of the State of New York and the Court of Appeals of said State in affirming the judgment of the Supreme Court erred in holding and deciding that the defendant is liable to the plaintiff for damages to structures or borings in the Hudson River belonging to the plaintiff, caused by a collision in July, 1909, between canal boats in tow of defendant's tug and the structures of borings, in violation of Act of Congress of March 3, 1899, U. S. Comp. Stat. 1901, pp. 35-41, and by said decision was drawn in question an immunity specially set up and claimed under a statute of the United States, and the immunity thus set up and claimed by the defendant was denied.

3rd. That the Supreme Court of the State of New York and the Court of Appeals of said State, in affirming the judgment of the Supreme Court erred in holding and deciding that the plaintiff or Board of Water Supply of the City of New York had authority, pursuant to Act of Congress of March 3, 1899, and U. S. Comp. Stat. 1901, pp. 35-41, to erect and maintain structures of borings in the channel of the Hudson River, and by said decision was drawn in question an immunity specially set up and claimed by the de-

fendant herein, under a statute of the United States, and the immunity thus set up and claimed was denied.

4th. That the Supreme Court of the State of New York and the Court of Appeals of said State, in affirming the judgment of
603 the Supreme Court erred in holding and deciding that the borings of structures erected by the plaintiff in the Hudson River were not obstructions to the navigation of the Hudson River, within the meaning of Act of Congress of March 3, 1899, U. S. Comp. Stat. 1901, pp. 35-41, and by said decision was drawn in question an immunity specially set up and claimed by the defendant herein, and the immunity thus set up and claimed was denied.

5th. That the Supreme Court of the State of New York and the Court of Appeals of said State, in affirming the judgment of the Supreme Court erred in giving judgment to the plaintiff, the Phœnix Construction Company vs. Cornell Steamboat Company, whereas by the law of the land the said judgment ought to have been given to the said Cornell Steamboat Company against the Phœnix Construction Company, and the said Cornell Steamboat Company prays that the judgment aforesaid may be reversed.

AMOS VAN ETTEN,
Attorney for Plaintiff-in-Error.

J. PARKER KIRLIN, *Counsel.*

F. J. G.

603½ [Endorsed:] Supreme Court of the United States. Cornell Steamboat Company, Plaintiff-in-Error, against Phœnix Construction Company, Defendant-in-Error. Action No. 3. Assignments of error. Amos Van Etten, Attorney for Plaintiff-in-Error, Kingston, N. Y. Copy Rec'd February 13, '14. E. Crosby Kindleberger, Attorney for Def.-in-Error. Convers & Kirlin, 27 William Street, New York.

604 UNITED STATES OF AMERICA, *ss:*

To Phœnix Construction Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the State of New York, wherein Cornell Steamboat Company is plaintiff-in-error, and you are defendant-in-error, to show cause, if any there be, why the judgment rendered against the said plaintiff-in-error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Willard Bartlett, Chief Judge of the New York Court of Appeals, this 7th day of February, in the year of our Lord one thousand nine hundred and fourteen.

[Seal State of New York Court of Appeals.]

WILLARD BARTLETT,
Chief Judge of the New York Court of Appeals.

F. J. G.

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604½ [Endorsed:] Supreme Court of the United States. Cornell Steamboat Company, Plaintiff-in-Error, against Phœnix Construction Company, Defendant-in-Error. Action No. 1. Citation. Amos Van Etten, Attorney for Plaintiff-in-Error, Kingston, N. Y. Copy Received Phœnix Construction Co., by E. Crosby Kindleberger, attorney, February 13, 1904. Convers & Kirlin, 27 William Street, New York.

605 UNITED STATES OF AMERICA, *ss:*

To Phœnix Construction Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the State of New York, wherein Cornell Steamboat Company is plaintiff-in-error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff-in-error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Willard Bartlett, Chief Judge of the New York Court of Appeals, this 7th day of February, in the year of our Lord one thousand nine hundred and fourteen.

[Seal of State of New York Court of Appeals.]

WILLARD BARTLETT,
Chief Judge of the New York Court of Appeals.

F. J. G.

605½ [Endorsed:] Supreme Court of the United States. Cornell Steamboat Company, Plaintiff-in-Error, against Phœnix Construction Company, Defendant-in-Error. Action No. 2. Citation. Amos Van Etten, Attorney for Plaintiff-in-Error, Kingston, N. Y. Copy received — Phœnix Construction Co. by E. Crosby Kindleberger, attorney, February 13, 1914. Convers & Kirlin, 27 William Street, New York.

606 UNITED STATES OF AMERICA, *ss:*

To Phœnix Construction Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the State of New York, wherein Cornell Steamboat Company is plaintiff-in-error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff-in-error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Willard Bartlett, Chief Judge of the New

York Court of Appeals, this 7th day of February, in the year of our Lord one thousand nine hundred and fourteen.

[Seal of State of New York Court of Appeals.]

WILLARD BARTLETT,
Chief Judge of the New York Court of Appeals.

F. J. G.

606½ [Endorsed:] Supreme Court of the United States. Cornell Steamboat Company, Plaintiff-in-Error, against Phœnix Construction Company, Defendant-in-Error. Action No. 3. Citation. Amos Van Etten, Attorney for Plaintiff-in-Error, Kingston, N. Y. Copy received — Phœnix Construction Co. by E. Crosby Kindleberger, attorney, February 13, 1914. Convers & Kirlin, 27 William Street, New York.

607 Court of Appeals, State of New York.

CORNELL STEAMBOAT COMPANY, Plaintiff-in-Error,
against
PHŒNIX CONSTRUCTION COMPANY, Defendant-in-Error.

Bond on Writ of Error and Supersedeas.

Know All Men By These Presents, That Cornell Steamboat Company, a corporation, incorporated under the laws of the State of New York, having an office and principal place of business at 33 Coenties Slip, in the Borough of Manhattan, City of New York, as principal, and Edward Coykendall and Isaac M. North as sureties, are held and firmly bound unto Phœnix Construction Company, in the sum of $30,000 and interest, lawful money of the United States, to be paid to the said Phœnix Construction Company, the defendant-in-error herein, in the above-entitled action, for the payment of which, well and truly to be made, the said principal and the said sureties bind themselves, their and each of their successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this second day of February, in the year one thousand nine hundred and fourteen:

608 Whereas in the above-entitled action the Court of Appeals of the State of New York rendered its judgment on the 30th day of December, 1913, affirming the judgment of the Appellate Division of the Supreme Court of the State of New York, and the said Cornell Steamboat Company having obtained a writ of error and filed a copy thereof in the Clerk's office of the Court of Appeals of the State of New York to reverse the judgment in the aforesaid suit, and a citation directed to the said Phœnix Construction Company, citing and admonishing it to be and appear at the Supreme Court of the United States at Washington within thirty days from the date thereof, now the condition of this obligation is such that if the said Cornell Steamboat Company should prosecute the said

writ of error to effect and answer all damages and costs if it fails to make its plea good, then the above obligation to be void, else remain in full force and virtue.

[Seal Cornell Steamboat Company.]

CORNELL STEAMBOAT COMPANY,
By GEO. COYKENDALL, *Vice Pres't.*
EDWARD COYKENDALL. [L. S.]
ISAAC M. NORTH. [L. S.]

ALBERT H. K. FLEMING, *Secretary.*

609 STATE OF NEW YORK,
County of Ulster, ss:

On this 2nd day of February, 1914, before me personally appeared Edward Coykendall and Isaac M. North to me personally known and known to me to be the persons described in the foregoing instrument and they severally acknowledged that they executed the same for the uses and purposes therein mentioned, and that each deposes and says that he is worth the sum of $30,000 over and above all his debts and liabilities.

[SEAL.]

O. J. HEITZMAN,
Notary Public, Ulster County, N. Y.

The above bond for costs and as a supersedeas bond approved as to form and sufficiency of surety.
February second, 1914.

WILLARD BARTLETT,
Chief Judge of the Court of Appeals.

610 It is stipulated and consented that the above bond of Cornell Steamboat Company, plaintiff-in-error, on a writ of error to the Supreme Court of the United States in the above-entitled cause Action- Nos. 1, 2 & 3 may be fixed at the sum of $30,000 and interest, and that the same when filed shall be effective as a bond for costs on such appeal and as a supersedeas bond as well.

E. CROSBY KINDLEBERGER,
Attorney for Phœnix Construction Company.

F. J. G.

610½ [Endorsed:] Court of Appeals, State of New York. Cornell Steamboat Company, Plaintiff-in-Error, against Phœnix Construction Company, Defendant-in-Error. Action No. 1. (Copy.) Bond on Writ of Error and Supersedeas. Actions 1, 2, & 3. Convers & Kirlin, 27 William Street, New York.

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611 Court of Appeals, State of New York.

CORNELL STEAMBOAT COMPANY, Plaintiff-in-Error,
against
PHŒNIX CONSTRUCTION COMPANY, Defendant-in-Error.

Bond on Writ of Error and Supersedeas.

Know All Men By These Presents, That Cornell Steamboat Company, a corporation, incorporated under the laws of the State of New York, having an office and principal place of business at 33 Coenties Slip, in the Borough of Manhattan, City of New York, as principal, and Edward Coykendall and Isaac M. North as sureties, are held and firmly bound unto Phœnix Construction Company, in the sum of $30,000 and interest, lawful money of the United States, to be paid to the said Phœnix Construction Company, the defendant-in-error herein, in the above-entitled action, for the payment of which, well and truly to be made, the said principal and the said sureties bind themselves, their and each of their successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this second day of February, in the year one thousand nine hundred and fourteen:

612 Whereas in the above-entitled action the Court of Appeals of the State of New York rendered its judgment on the 30th day of December, 1913, affirming the judgment of the Appellate Division of the Supreme Court of the State of New York, and the said Cornell Steamboat Company having obtained a writ of error and filed a copy thereof in the Clerk's office of the Court of Appeals of the State of New York to reverse the judgment in the aforesaid suit, and a citation directed to the said Phœnix Construction Company, citing and admonishing it to be and appear at the Supreme Court of the United States at Washington within thirty days from the date thereof, now the condition of this obligation is such that if the said Cornell Steamboat Company should prosecute the said writ of error to effect and answer all damages and costs if it fails to make its plea good, then the above obligation to be void, else remain in full force and virtue.

[Seal Cornell Steamboat Company.]

CORNELL STEAMBOAT COMPANY,
By GEO. COYKENDALL, *Vice Pres't.*
EDWARD COYKENDALL. [L. S.]
ISAAC M. NORTH. [L. S.]

ALBERT H. K. FLEMING, *Secretary.*

613 STATE OF NEW YORK,
County of Ulster, ss:

On this 2nd day of February, 1914, before me personally appeared Edward Coykendall and Isaac M. North to me personally known and

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known to me to be the persons described in the foregoing instrument and they severally acknowledged that they executed the same for the uses and purposes therein mentioned, and that each deposes and says that he is worth the sum of $30,000 over and above all his debts and liabilities.

[SEAL.]

O. J. HEITZMAN,
Notary Public, Ulster County, N. Y.

The above bond for costs and as a supersedeas bond approved as to form and sufficiency of surety.

February second, 1914.

WILLARD BARTLETT,
Chief Judge of the Court of Appeals.

614 It is stipulated and Consented that the above bond of Cornell Steamboat Company, plaintiff-in-error, on a writ of error to the Supreme Court of the United States in the above-entitled cause Action- Nos. 1, 2 & 3 may be fixed at the sum of $30,000 and interest, and that the same when filed shall be effective as a bond for costs on such appeal and as a supersedeas bond as well.

E. CROSBY KINDLEBERGER,
Attorney for Phœnix Construction Company.

F. J. G.

614½ [Endorsed:] Court of Appeals, State of New York. Cornell Steamboat Company, Plaintiff-in-Error, against Phœnix Construction Company, Defendant-in-Error. Action No. 2. (Copy.) Bond on Writ of Error and Supersedeas. Action- 1, 2, & 3. Convers & Kirlin, 27 William Street, New York.

615 Court of Appeals, State of New York.

CORNELL STEAMBOAT COMPANY, Plaintiff-in-Error,
against
PHŒNIX CONSTRUCTION COMPANY, Defendant-in-Error.

Bond on Writ of Error and Supersedeas.

Know All Men By These Presents, That Cornell Steamboat Company, a corporation, incorporated under the laws of the State of New York, having an office and principal place of business at 33 Coenties Slip, in the Borough of Manhattan, City of New York, as principal, and Edward Coykendall and Isaac M. North as sureties, are held and firmly bound unto Phœnix Construction Company, in the sum of $30,000 and interest, lawful money of the United States, to be paid to the said Phœnix Construction Company, the defendant-in-error herein, in the above-entitled action, for the payment of which, well and truly to be made, the said principal and the said sureties bind themselves, their and each of their successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this second day of February, in the year one thousand nine hundred and fourteen:

616 Whereas in the above-entitled action the Court of Appeals of the State of New York rendered its judgment on the 30th day of December, 1913, affirming the judgment of the Appellate Division of the Supreme Court of the State of New York, and the said Cornell Steamboat Company having obtained a writ of error and filed a copy thereof in the Clerk's office of the Court of Appeals of the State of New York to reverse the judgment in the aforesaid suit, and a citation directed to the said Phœnix Construction Company, citing and admonishing it to be and appear at the Supreme Court of the United States at Washington within thirty days from the date thereof, now the condition of this obligation is such that if the said Cornell Steamboat Company should prosecute the said writ of error to effect and answer all damages and costs if it fails to make its plea good, then the above obligation to be void, else remain in full force and virtue.

[Seal Cornell Steamboat Company.]

CORNELL STEAMBOAT COMPANY,
By GEO. COYKENDALL, *Vice Pres't.*
EDWARD COYKENDALL. [L. S.]
ISAAC M. NORTH. [L. S.]

ALBERT H. K. FLEMING, *Secretary.*

617 STATE OF NEW YORK,
County of Ulster, ss:

On this 2nd day of February, 1914, before me personally appeared Edward Coykendall and Isaac M. North to me personally known and known to me to be the persons described in the foregoing instrument and they severally acknowledged that they executed the same for the uses and purposes therein mentioned, and that each deposes and says that he is worth the sum of $30,000 over and above all his debts and liabilities.

[SEAL.]

O. J. HEITZMAN,
Notary Public, Ulster County, N. Y.

The above bond for costs and as a supersedeas bond approved as to form and sufficiency of surety.
February second, 1914.

WILLARD BARTLETT,
Chief Judge of the Court of Appeals.

618 It is stipulated and consented that the above bond of Cornell Steamboat Company, plaintiff-in-error, on a writ of error to the Supreme Court of the United States in the above-entitled cause Action- Nos. 1, 2 & 3 may be fixed at the sum of $30,000 and interest, and that the same when filed shall be effective as a bond for costs on such appeal and as a supersedeas bond as well.

E. CROSBY KINDLEBERGER,
Attorney for Phœnix Construction Company.

F. J. G.

618½ [Endorsed:] Court of Appeals, State of New York. Cornell Steamboat Company, Plaintiff-in-Error, against Phœnix Construction Company, Defendant-in-Error. Action No. 3. (Copy.) Bond on Writ of Error and Supersedeas. Actions No. 1, 2, & 3. Convers & Kirlin, 27 William Street, New York.

619 Supreme Court of the United States.

CORNELL STEAMBOAT COMPANY, Plaintiff-in-Error,
against
PHŒNIX CONSTRUCTION COMPANY, Defendant-in-Error.

Prayer for Reversal.

To the Honorable the Supreme Court of the United States:

And now comes the above-named plaintiff-in-error and, in connection with his writ of error issued by this Court to the Supreme Court of the State of New York, New York County, he prays for a reversal of the judgment against him entered in the office of the Clerk of New York County, on an action brought by the defendant-in-error against the plaintiff-in-error in the said Court, and also prays for a reversal of the judgment of affirmance entered in the office of said Clerk on January 8, 1914, upon an order of affirmance of the Appellate Division of the Supreme Court, First Judicial Department, entered in the office of the Clerk thereof, on November 3, 1911, and prays for a reversal of the judgment of the Court of Appeals affirming said judgment of the Supreme Court.

AMOS VAN ETTEN,
Attorneys for Pl'ff-in-Error.
J. PARKER KIRLIN, *Counsel.*

619½ [Endorsed:] Supreme Court of the United States. Cornell Steamboat Company, Plaintiff-in-Error, against Phœnix Construction Company, Defendant-in-Error. Action No. 1. Prayer for Reversal. Amos Van Etten, Attorney for Plaintiff-in-Error, Kingston, N. Y. Copy Rec'd February 13, 1914. E. Crosby Kindleberger, Att'y for Def.-in-Error. Convers & Kirlin, 27 William Street, New York.

620 Supreme Court of the United States.

CORNELL STEAMBOAT COMPANY, Plaintiff-in-Error,
against
PHŒNIX CONSTRUCTION COMPANY, Defendant-in-Error.

Prayer for Reversal.

To the Honorable the Supreme Court of the United States:

And now comes the above-named plaintiff-in-error and, in connection with his writ of error issued by this Court to the Supreme

Court of the State of New York, New York County, he prays for a reversal of the judgment against him entered in the office of the Clerk of New York County, on an action brought by the defendant-in-error against the plaintiff-in-error in the said Court, and also prays for a reversal of the judgment of affirmance entered in the office of said Clerk on January 8, 1914, upon an order of affirmance of the Appellate Division of the Supreme Court, First Judicial Department, entered in the office of the Clerk thereof, on November 3, 1911, and prays for a reversal of the judgment of the Court of Appeals affirming said judgment of the Supreme Court.

AMOS VAN ETTEN,
Attorney for Pl'ff-in-Error.

J. PARKER KIRLIN, *Counsel.*

F. J. G.

620½ [Endorsed:] Supreme Court of the United States. Cornell Steamboat Company, Plaintiff-in-Error, against Phœnix Construction Company, Defendant-in-Error. Action No. 2. Prayer for Reversal. Amos Van Etten, Attorney for Plaintiff-in-Error, Kingston, N. Y. Copy Rec'd Feb. 13, 1914. E. Crosby Kindleberger, Att'y for Def.-in-Error. Convers & Kirlin, 27 William Street, New York.

621 Supreme Court of the United States.

CORNELL STEAMBOAT COMPANY, Plaintiff-in-Error,
against
PHOENIX CONSTRUCTION COMPANY, Defendant-in-Error.

Prayer for Reversal.

To the Honorable the Supreme Court of the United States:

And now comes the above-named plaintiff-in-error and, in connection with his writ of error issued by this Court to the Supreme Court of the State of New York, New York County, he prays for a reversal of the judgment against him entered in the office of the Clerk of New York County, on an action brought by the defendant-in-error against the plaintiff-in-error in the said Court, and also prays for a reversal of the judgment of affirmance entered in the office of said Clerk on January 8, 1914, upon an order of affirmance of the Appellate Division of the Supreme Court, First Judicial Department, entered in the office of the Clerk thereof, on — and prays for a reversal of the judgment of the Court of Appeals affirming said judgment of the Supreme Court.

AMOS VAN ETTEN,
Attorney for Pl'ff-in-Error.

J. PARKER KIRLIN, *Counsel.*

F. J. G.

621½ [Endorsed:] Supreme Court of the United States. Cornell Steamboat Company, Plaintiff-in-Error, against Phœnix Construction Company, Defendant-in-Error. Action No. 3. Prayer for Reversal. Amos Van Etten, Attorney for Plaintiff-in-Error, Kingston, N. Y. Copy Rec'd February 13, '14. E. Crosby Kindleberger, Attorney for Def.-in-Error. Convers & Kirlin, 27 William Street, New York.

622 Supreme Court, State of New York.

Actions Numbers 1, 2, and 3.

PHŒNIX CONSTRUCTION COMPANY, Plaintiff,
against
CORNELL STEAMBOAT COMPANY, Defendant.

It is hereby stipulated that the return of the Clerk of the Supreme Court to the writs of error of the Supreme Court of the United States in these three actions may consist of the one record in these actions used in the Court of Appeals, and copies of the proceedings and papers in the three actions had in the Supreme Court subsequent to the remittiturs of the Court of Appeals, annexed to the transcripts of record.

Dated, February 16th, 1914.

E. CROSBY KINDLEBERGER,
Attorneys for Plaintiff.
AMOS VAN ETTEN,
Attorney for Defendant.

F. J. G.

623 (Actions Nos. I, II, III.)

PHŒNIX CONSTRUCTION COMPANY, Respondent,
v.
CORNELL STEAMBOAT COMPANY, Appellant.

(Decided December 30, 1913.)

J. Parker Kirlin for appellant.
E. Crosby Kindleberger for respondent.

GRAY, *J.*:

These three actions arose out of collisions by canal boats, in tow of the defendant's tugboats, with certain scows and other properties of the plaintiff in July and October, 1908. The plaintiff was under contract with the board of water supply of the city of New York to make boring tests in the bottom of the Hudson river; in order to determine at what place an aqueduct, or a tunnel, should be constructed for the conveyance of waters from the west side to the

east side of the river, with which it was proposed to supply the city of New York. While carrying on these borings at points in the river opposite Storm King mountain, on three occasions in the night time, the plants established at certain of the borings, consisting in scows, platforms, drills, pipes, or other incidental properties, were struck by tows of canal boats and were, thereby, injured, or destroyed. The plaintiff charged in its complaints that these collisions were due to the negligent management of the masters of the defendant's steam tugs and that the defendant was responsible for the damages sustained. The answer denied negligence and alleged that the plaintiff was unlawfully interfering with navigation upon the river. The referee, before whom the trial of the issues was had, decided in favor of the plaintiff, in each case; holding upon the facts found that the defendant was liable for the actual damages sustained and in action No. III, where the work upon the boring had to be abandoned, that it was liable, in addition, for the profits proved to have been lost upon the contract for the particular boring there in question. The judgments entered for the plaintiff upon the referee's decisions have been, unanimously, affirmed by the Appellate Division, in the first judicial department, without opinion and the defendant has, further, appealed to this court.

The unanimous affirmance below has conclusively disposed of all questions depending upon the facts found by the referee and I find no error of law, which would justify a reversal of the judgments in this court.

The referee has found, very fully, the facts and, briefly stated, this is the case as disclosed by them. The board of water supply of the state of New York, pursuant to statutory authority, was engaged in the construction of an aqueduct to supply the inhabitants of the city of New York with pure water, collected upon the west side of the Hudson river, and, as a part of that undertaking,
624 contracted with the plaintiff to make test borings in the bed of the river. Prior to the making of the borings, the granting of an application by the board to drive pipe and to anchor vessels, near New Hamburg, was recommended by the chief of engineers of the United States army and permission was granted by the acting secretary of war on February 2d, 1906. Upon a subsequent application by the board to change the location of the borings to the part of the river opposite the mountain, known as Storm King, Colonel Lockwood of the corps of engineers of the United States army, located in New York city, wrote that "by the authority of the Secretary of War the permit was modified so as to permit the work to be carried on at Storm King." At a subsequent date, Colonel Knight of the engineer corps, at the same local office, wrote "granting permission to the Board * * * to anchor vessels at the Storm King line;" limiting simultaneous borings to four on the line and requiring that there should be left unobstructed two channels of specified depths and widths. At the time of the collisions, such channels existed and were amply sufficient for the passage of vessels and of tows. The defendant had been notified of, and was familiar with, the positions of the plaintiff's vessels at each

boring and, on the nights in question, the plaintiff, in conformity with the requirements of the officials of the United States Government, maintained white anchor lights upon each vessel. In each case, the referee finds, with considerable particularity, all of the facts relating to the positions of borings; to the plaintiff's vessels and their situation at each boring; to the work in progress, with a description of the plant and machinery in use; to the operation of the defendant's tugboats in charge of tows descending the river and the way in which the collisions occurred with the borings and to the losses to the plaintiff, caused by the damaging, or destruction, of its vessels and other properties. The referee finds that the masters of the tugboats were negligent and that the plaintiff was without contributing fault, and, therefore, directed judgment, in each case, for the amounts, which he had found to be the damages recoverable by the plaintiff.

The principal contention of the appellant, and, as I think, the only point we need consider, is that the plaintiff was a wrongdoer, whose borings constituted unlawful obstructions to the navigation of the Hudson river, and, therefore, that it could not recover the damages sustained, in the absence of a finding of willful fault on the part of the defendant. Basing the argument on the provisions of the act of Congress of March 3d, 1899, it is insisted that the plaintiff had no lawful authority to maintain its boring plants and scows in the river. The referee found, at the request of the defendant, that the plaintiff had failed to show any lawful authority;
625 that no act of Congress authorized the boring plants and that "the evidence does not show that the board * * * had obtained from the secretary of war a lawful permit." He, also, refused to find that "the evidence fails to show that the plaintiff was lawfully engaged in the performance of the work." In his opinion, he expresses doubt upon the question of the plaintiff's authority, as derived from the permits, and declines to decide it. He considered that the right of the plaintiff to recover its damages is not dependent upon the existence of an authorized permit from the secretary of war and that it rests upon the failure of the defendant's servants to use reasonable and ordinary care in navigating the tugboats on the occasions in question.

The action being at common law, while the judgment might be sustained, in my opinion, upon the theory of the referee, I, also, think that his findings as to the granting of the application of the board of water supply by the secretary of war, upon the recommendation of the chief of engineers, and as to the subsequent permits in modification of the original permission, considered in connection with the documents themselves, which evidence the action of the Federal officials, do, sufficiently, establish that the board had authority to make the test borings, in question, and show that the plaintiff was lawfully at work in the river. Section 9 of the act of Congress of March 3d, 1899, makes it unlawful "to construct any bridge, dam, dike, or causeway over, or in, any * * * navigable river, or other navigable water, of the United States, until the consent of Congress * * * shall have been obtained and * * * plans

* * * submitted," etc. Section 10 provides "That the creation of any obstruction, not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any * * * navigable river, or other water of the United States, * * * except on plans recommended by the chief of engineers and authorized by the secretary of war; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity * * * of the channel of any navigable water of the United States, unless the work has been recommended by the chief of engineers and authorized by the secretary of war prior to beginning the same." Section 9 has no application; because the work in question is not of the description of the structures specified in the section. The two sections cover the whole subject of structures to be erected in, or over, navigable waters and provide when the structures described may, or may not, be erected without the previous consent of Congress. If the case is one which called for permission from
626 the Federal authorities, it, rather, falls within those provisions of section 10, which leave the doing of any work modifying the capacity of channels in navigable waters to the recommendation of the chief of engineers and the authorization, thereupon, of the secretary of war. The prohibition against "the creation of any obstruction, not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States" does not apply to the case; inasmuch as, within the just and reasonable construction to be given to the language, the plaintiff was not engaged in the "creation" of any obstruction to the navigability of the river. The intent of the statute was against the construction of structures of a more, or less, permanent nature and of the description of those particularized, unless authorized as prescribed. The plaintiff was executing a contract to test by borings the nature of the bed of the river, through which the construction of the aqueduct, or tunnel, was contemplated, and the plant used for the purpose constituted but a temporary obstruction of the river, which, upon execution of its purpose, would be removed. The intendment of the statute should not be so strictly construed as to be unfavorable to the temporary use of navigable channels in furtherance of public improvements within a state; when the permission of the proper officials of the United States government, generally, has been obtained. This permission appears to have been applied for by the board of water supply and I think it was, in fact, granted. If that be true, then, the work in progress in the river waters was not illegal, nor was it a nuisance, however the navigable capacity of the river may, for the time, have been interfered with. Assuming that by a proper construction of the act of Congress the case falls under the provisions of section 10, as, for instance, an alteration, or a modification, of the course, or capacity, of the channel of the Hudson river, the proof is that, by an instrument in writing, in February, 1906, permission was "granted to the board of water supply of the city of New York,

in accordance with the recommendation of the chief of engineers, U. S. army, to drive piles and anchor boats, as specified in the application, in the Hudson river near New Hamburgh, N. Y.," etc. Conditions were attached to the permission and the work was to "be subject to the supervision and approval of the local officer of the corps of engineers, U. S. Army, whose address is Army Building, New York City." This instrument was signed by the acting secretary of war. In March, 1907, by a letter to the board, from the United States engineers' office, in the Army Building, in the city of New York, "in response to its application and by authority of the secretary of war," the permit to drive piles and to anchor boats in the Hudson river "in connection with making borings," was
627 "modified," so that "on the Storm King line work shall not be in progress simultaneously on more than three borings, except within 800 feet of the east shore, where additional borings may be made simultaneously," etc. A clause regulated the clear space to be maintained in the river. As bearing upon the action of the war department in granting permission to make borings in the river, in connection with the aqueduct, mention should be made that in May, 1907, permission was granted by the secretary of war, in accordance with the recommendation of the chief of engineers, U. S. army, to dump along both shores, in the vicinity of Cornwall and Storm King Station "spoil from tunnel shafts to be sunk in connection with a water supply to be furnished from the Catskill Mountains," etc. In February, 1908, under indorsement by the acting secretary of war, the "local officers of the corps of engineers," in New York city, to whom the secretary of war had referred the supervision of work in his permit, in response to an application of the board, granted permission "to drive piles and anchor boats, as requested, and to make borings," with conditions; among which were that "on Storm King line" simultaneous borings were restricted to four, that two channels should be left unobstructed and that obstructions should be removed as soon as each boring was finished. Corroboration of the authorization relied upon may be found in the contents of a "memorandum of action by the (War) Department in the matter of applications by the Board of Water Supply for permission to make borings in connection with location of Catskill aqueduct;" which was furnished to the defendant and used upon trial. It seems to me quite clear that the work of making test borings in the river bottom, for the purpose of a tunnel construction, was recognized and sufficiently acted upon by the war department in approval of the plans, and technical and unsubstantial objections to the manner of granting the permission to occupy the channels, or to the form of the permits, should be disregarded.

I have reached the conclusion, upon the question discussed, that no defense was made out of an unlawful obstruction of the channel of the Hudson river and, as no other question requires consideration, I advise that the judgments appealed from be affirmed.

Cullen, Ch. J., Willard Bartlett, Cuddeback and Hogan, JJ., concur; Werner, J., absent; Miller, J., not sitting.

Judgments affirmed, with costs.

I certify the foregoing to be a true and correct copy of the opinion in the above entitled case and of the whole thereof.
January 23, 1914.

J. NEWTON FIERO,
State Reporter.

F. J. G.

[Endorsed:] Phœnix Construction Co. v. Cornell Steamboat Co. Gray, J.

628 STATE OF NEW YORK,
County of New York, ss:

Clerk's Office of the Supreme Court of the State of New York for the County of New York.

I, William F. Schneider, Clerk of the County of New York and of the Supreme Court of the State of New York for the said County of New York, by virtue of the annexed Writ of Error which was served upon me on the 16th day of Feb'y 1914, and in obedience thereto, do hereby certify that the foregoing pages numbered from 1 to 627 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the suit of Phœnix Construction Company, Pl'ff, vs. Cornell Steamboat Company, Def't, mentioned in said Writ of Error, as the same remain of record and on file in my office; and that annexed hereto is the Petition for the said Writ of Error, the Assignment of Errors and Prayer for Reversal, the Citation to the Defendants in error with admission of service of the same and said Writ of Error served upon me.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed and have hereunto set my hand, at my office in the City and County of New York, the 16th day of February 1914.

[NEW YORK SEAL.]

WM. F. SCHNEIDER, *Clerk.*

Endorsed on cover: File No. 24,084. New York Supreme Court. Term No. 933. Cornell Steamboat Company, plaintiff in error, vs. Phœnix Construction Company. File No. 24,085. Term No. 934. Cornell Steamboat Company, plaintiff in error, vs. Phœnix Construction Company. File No. 24,086. Term No. 935. Cornell Steamboat Company, plaintiff in error, vs. Phœnix Construction Company. Filed March 9th, 1914. File Nos. 24,084, 24,085, and 24,086.

FILED
APR 11 1914
JAMES D. MAHER

Supreme Court of the United States,

OCTOBER TERM, 1913.

Nos. 933, 934, 935.

CORNELL STEAMBOAT COMPANY,
Plaintiff-in-Error,

against

PHOENIX CONSTRUCTION COMPANY,
Defendant-in-Error.

MOTION TO DISMISS FOR LACK OF JURISDICTION OR TO AFFIRM JUDGMENTS BELOW AND BRIEF IN SUPPORT OF MOTION.

E. CROSBY KINDLEBERGER,
Counsel for Defendant-in-Error.

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Supreme Court of the United States.

CORNELL STEAMBOAT COMPANY, Plaintiff-in-Error, *against* PHOENIX CONSTRUCTION COMPANY, Defendant-in-Error.	Action No. I, October Term, 1913. No. 933
CORNELL STEAMBOAT COMPANY, Plaintiff-in-Error, *against* PHOENIX CONSTRUCTION COMPANY, Defendant-in-Error.	Action No. II, October Term, 1913. No. 934.
CORNELL STEAMBOAT COMPANY, Plaintiff-in-Error, *against* PHOENIX CONSTRUCTION COMPANY, Defendant-in-Error	Action No. III, October Term, 1913. No. 935.

Motion to Dismiss Writs of Error or to Affirm the Judgments Below.

AND now comes Phoenix Construction Company by its counsel appearing in its behalf, and moves this Court:

(1) To dismiss the writs of error herein on the ground that this court is without jurisdiction of the causes sought to be reviewed by said writs of error.

(2) To affirm the judgments of the Supreme Court of the State of New York which are sought to be reviewed by the writs of error herein on the grounds that the rulings, decisions and judgments in the said Supreme Court are obviously correct; that it is manifest that the writs of error were taken for delay only; and that the questions on which the decision of the causes depend are so frivolous as not to need further argument.

(3) That damages of $1,848.75, being 10% of the Judgments which aggregate $18,487.46, be awarded the defendant-in-error upon the dismissal or the affirmance of said writs of error under rule 23 of this Court.

Dated, April 6, 1914.

E. Crosby Kindleberger,
Of Counsel for Defendant-in-Error.

Supreme Court of the United States.

CORNELL STEAMBOAT COMPANY, Plaintiff-in-Error, *against* PHOENIX CONSTRUCTION COMPANY, Defendant-in-Error.	**Action No. I, October Term, 1913. No. 933**
CORNELL STEAMBOAT COMPANY, Plaintiff-in-Error, *against* PHOENIX CONSTRUCTION COMPANY, Defendant-in-Error.	**Action No. II, October Term, 1913. No. 934.**
CORNELL STEAMBOAT COMPANY, Plaintiff-in-Error, *against* PHOENIX CONSTRUCTION COMPANY, Defendant-in-Error.	**Action No. III, October Term, 1913. No. 935.**

Sirs.—PLEASE TAKE NOTICE that the defendant-in-error in the above entitled actions will on the 27th day of April, 1914, at 12 o'clock noon or as soon thereafter as counsel can be heard at the Supreme Court Room in the City of Washington, District of Columbia, move this court on the records herein, which are printed in one book.

(1) To dismiss the writs of error herein on the ground that this court is without jurisdiction of the causes sought to be reviewed by said writs of error.

(2) To affirm the judgments of the Supreme Court of the State of New York which are sought to be reviewed by the writs of error herein on the grounds that the rulings, decisions and judgments in the said Supreme Court are obviously correct; that it is manifest that the writs of error were taken for delay only; and that the questions on which the decision of the causes depend are so frivolous as not to need further argument.

(3) That damages of $1,848.75, being 10% of the Judgments which aggregate $18,487.46, be awarded the defendant-in-error upon the dismissal or the affirmance of said writs of error under rule 23 of this Court.

Together with this motion, the defendant-in-error serves upon said plaintiff-in-error a copy of its brief to be filed in the Supreme Court in support of the said motion.

Dated, April 6, 1914.

E. Crosby Kindleberger,
Of Counsel for Defendant-in-Error,
2 Rector Street,
Borough of Manhattan,
City of New York.

To Messrs.
J. Parker Kirlin,
Counsel for Plaintiff-in-Error,
27 William St.,
New York City.

Amos Van Etten,
Attorney for Plaintiff-in-Error,
Kingston, N. Y.

Supreme Court of the United States.

CORNELL STEAMBOAT COMPANY,
Plaintiff-in-error,

against

PHOENIX CONSTRUCTION COMPANY,
Defendant-in-error.

Actions I, II, III. Oct. Term 1913. Nos. 933, 934, 935.

Brief for Defendant-in-Error on Motion to Dismiss or Affirm Judgments.

These three cases have been brought to this court by writs of error from the Supreme Court of the State of New York, after the judgments for the plaintiff awarded by the referee to whom the cases were sent, for $4,146.58, $4,432.52 and $9,908.36 (pp. 26, 136, 197) were unanimously affirmed by the Appellate Division of the Supreme Court, State of New York (pp. 293, 294), and by the Court of Appeals, the highest court of the state (pp. 317-320) The actions were instituted to recover damages for negligence of the defendant, plaintiff-in-error, in causing its tugs and canal boats navigating the Hudson River on three occasions in 1908, to run into certain temporary and experimental borings in the bed of the river upon which the plaintiff, defendant-in-error, was working as the contractor for the Board of Water Supply of the City of New York. The referee found that the

negligence of the defendant was clearly established in each of the three cases, and his detailed findings of fact and conclusions of law were unanimously affirmed by the Appellate Division of the Supreme Court and also by the Court of Appeals. These borings were required by the engineers who were building the aqueduct for the City of New York in order to determine where it was best to tunnel under the Hudson River and bring waters accumulated on the west side of the river over to the east side. The work was expressly authorized under the New York State act of 1905, and the Board of Water Supply of the City of New York had received permission from the Secretary of War after recommendation of the Chief of Engineers, for the maintenance of these temporary borings in the channel of the Hudson River, but no special act of Congress had been obtained.

The Assignments of Error.

The assignments of error in the three cases are identical in language (pp 331-334) and are five in number. Stripped of their verbiage they allege that the courts of New York erred in refusing to give the plaintiff in error an immunity claimed under the Act of Congress of March 3, 1899, and in deciding:

> (1) That the structures of the plaintiff were not unlawful obstructions of the channel of the Hudson River in violation of the Act of Congress of March 3, 1899.
>
> (2) That the defendant was liable to the plaintiff for damages to the structures, which were in violation of said Act of 1899.
>
> (3) That the plaintiff had authority pursuant to said Act of 1899 to erect and main-

tain the structures and borings in the channel of the river.

(4) That the structures or borings of the plaintiff were not obstructions to navigation within the meaning of said Act of 1899.

(5) In giving judgment to plaintiff where by the law of the land it should have been given to defendant.

The only Federal question which the assignments of error attempt to raise is that the Courts of New York failed to give the plaintiff-in-error the immunity it claimed under its construction of the Act of Congress of March 3, 1899.

The defendant-in-error claims that each of the cases hinged upon the negligence of the defendant, which is a non-Federal question, and that the Federal question was merely incidental and subsidiary and its decision was not necessary for the validity of the judgments. Moreover the decision made by the state courts was so obviously correct as to make the assignments of error frivolous and to deprive this court of jurisdiction.

Facts on Motion to Dismiss.

As the findings in all three of the actions upon the jurisdictional question are substantially similar, those of action No. 1 will be considered as typical.

The referee found that at the time of the collision the Board of Water Supply of the State of New York under authority of a statute of the state was engaged in making test borings in the bed of the Hudson River near Storm King, New York, and that such test borings were part of a great public improvement consisting in the construction

of an aqueduct for the supplying of the inhabitants of the City of New York with pure water (pp. 13, 119, 183).

He further found:

> "VIII: That prior to the making of the test borings the Board of Water Supply of the City of New York made an application to the Chief of Engineers of the United States Army to drive pipe and anchor vessels near New Hamburg and that the granting of this application was recommended by the Chief of Engineers of the United States Army, and permission to do this work was granted by Robert S. Oliver, Acting Secretary of War on the 2nd day of February, 1906" (p. 14).

The Court of Appeals' opinion referring to this original permit and to the subsequent ones, said:

> "Conditions were attached to the permission and the work was to 'be subject to the supervision and approval of the local officer of the corps of engineers, U. S. Army, whose address is Army Building, New York City.' This instrument was signed by the acting Secretary of War. In March, 1907, by a letter to the board, from the United States engineer's office, in the Army Building, in the city of New York, 'in response to its application and by authority of the secretary of war,' the permit to drive piles and to anchor boats in the Hudson River '*in connection with making borings*,' was modified,' so that 'on the *Storm King line* work shall not be in progress simultaneously on more than three borings, except within 800 feet of the east shore, where additional borings may be made simultaneously on more than three borings, except within 800 feet of the east shore, where additional borings may be made simultaneously,' etc. A clause regulated the clear space to be maintained in the river. As bear-

ing upon the action of the war department in granting permission to make borings in the river, in connection with the aqueduct, mention should be made that in May, 1907, permission was granted by the secretary of war, in accordance with the recommendation of the chief of engineers, U. S. Army, to dump along both shores, in the vicinity of Cornwall and Storm King station, '*spoil from tunnel shafts to be sunk in connection with a water supply to be furnished from the Catskill Mountains*,' etc. In February, 1908, under indorsement by the acting secretary of war, the 'local officer of the corps of engineers,' in New York city, to whom the secretary of war had referred the supervision of the work in his permit, in response to an application of the board, granted permission 'to drive piles and anchor boats, as requested, and to make borings,' with conditions; among which were that 'on the Storm King line' simultaneous borings were restricted to four, that two channels should be left unobstructed and that obstructions should be removed as soon as each boring was finished. Corroboration of the authorization relied upon may be found in the contents of a 'memorandum of action by the (War) Department in the matter of applications by the Board of Water Supply for permission to make borings in connection with location of Catskill aqueduct'; which was furnished to the defendant and used upon the trial." (210 N. Y. 120, 121; Record, p. 348.)

This statement of the facts is derived from plaintiff's exhibits 1 to 3 (pp. 235, 236), and defendant's exhibit 16 (p. 280), as well as the findings of the referee.

The opinion of the Court of Appeals, after reciting that the permits allowed four simultaneous borings providing there were maintained channels of specified width and depth, continued:

"At the time of the collisions, such channels existed and were amply sufficient for the passage of vessels and of tows. The defendant had been notified of, and was familiar with, the positions of the plaintiff's vessels at each boring and, on the nights in question, the plaintiff, in conformity with the requirements of the officials of the United States Government, maintained white anchor lights upon each vessel. In each case, the referee finds, with considerable particularity, all of the facts relating to the positions of borings; to the plaintiff's vessels and their situation at each boring; to the work in progress, with a description of the plant and machinery in use; to the operation of the defendant's tugboats in charge of tows descending the river and the way in which the collisions occurred with the borings and to the losses to the plaintiff, caused by the damaging, or destruction, of its vessels and other properties. The referee finds that the masters of the tugboats were negligent and that the plaintiff was without contributing fault, and, therefore, directed judgment, in each case, for the amounts, which he had found to be the damages recoverable by the plaintiff." (210 N. Y. 116, 117; Record, pp. 345, 346.)

The basis of these statements of Judge Gray were detailed findings by the referee (Findings XI-XXIV; pp. 19, 20). He specifically found that the two channels between the borings required by the permit were maintained, one of 600 feet width and the other of 400 feet width; that these channels were amply sufficient for the passage of vessels and tows and that a large number of tows and vessels had safely passed through the channels during the years 1907 and 1908. These findings were made on undisputed testimony, Leroy, one of the witnesses for the defendant-in-error, stating

that there were four tows going up and four down each day (p. 44), which was corroborated by Mr. Coykendall, one of the officers of the plaintiff-in-error (p. 71), who stated that these tows were all those of the defendant. The referee then found specifically that the defendant was familiar with the positions of the vessels of the plaintiff at each of the borings and had been notified where they were placed. He also found that the plaintiff maintained proper lights as prescribed by the officers of the United States Government; that they were burning and were seen over a mile away; and that there were no conditions of wind, tide or weather that were unusual. He then found:

> "XLVII: That neither plaintiff nor any of its servants or employees did or performed any negligent act that contributed to the collision". (p. 17.)

Similar findings were made in the other two actions (pp. 125, 187).

The referee made specific findings as to the actions of the defendant's tugs in Action No. 1. He found that the tide was ebb and that the collision occurred by the captain of the leading tug steering too close to boring 21 and then changing the course of his tug when he saw how close he was going with the tug which caused the rear of the long tow to swing and that although the tug cleared the boring the tow which had swung partly across the river swept down obliquely upon the boring and damaged the plaintiff's plant. The referee specifically found these facts as well as the details of the damages. (see Findings XXV-XLVI; pp. 16, 17.)

In actions 2 and 3, similar findings were made. No unusual conditions of the wind or weather ex-

isted, except that in action 3 quite a strong wind was blowing, and in action 2, a slight rain was falling, but the weather permitted the lights to be seen in both cases for over a mile, as the referee specifically found, and the captains of the defendant's tugs admitted that the weather conditions had nothing to do with their actions. The other two collisions were found by the referee to have been caused practically in the same way as the one in Action No. 1. The original courses of the long tugs and tows in each case being too close to one of the borings and the attempts being made on discovering this fact to change the course of the tug which whipped the rear of the tow around in the opposite direction, causing it in each case to slant across the river and the middle or rear of the tow to come down and hit the borings (see Findings, pp. 16, 17).

Numerous witnesses called by the plaintiff described the happening of the three collisions and they were largely corroborated by the cross-examination of the defendant's employees while a number of captains and pilots, called as experts for the defendant, admitted on cross-examination that when a tug has a long and heavy tow and is coming with the tide that a change of course by the tug will tend to cause the rear of the tow to go in the opposite direction and that this is particularly true when the change of course is sudden.

Pratt (pp. 75, 79).
Miller (p. 96).
Monahan (p. 92).
Elmendorf (pp. 214, 215).
Hyde (p. 219).
Gilligan (pp. 171, 172).

The referee found that the tugs were steered too close to the borings in the first instance, and that the captains also disregarded this well known rule. In these and other respects he found that the defendant was guilty of negligence which in each case required judgment for the damages sustained by the plaintiff's plant.

ARGUMENT ON MOTION TO DISMISS.

POINT I.

The defendant's negligence was the basis of the judgments of the State Courts and the alleged federal question was not necessary to the decisions, nor was it the turning point of the cases.

Beyond stating in the answers that the plaintiff's structures were unlawfully placed in the Hudson River and were unlawfully, improperly and unnecessarily interfering with navigation in a navigable stream of the United States, no claim was made in the answers that any Federal right or immunity prevented the maintaining of the actions. The answer in its fourth and fifth clauses (pp. 10, 11) specifically raised the questions of absence of negligence on the part of the defendant and contributory negligence on the part of the plaintiff. Although the referee in his opinion refers to the act of Congress of March 3, 1899, yet the findings and requests to find did not spe-

cifically require the construction of this act, no immunity under it was denied or asserted in the findings and requests to find which turned on the question of negligence.

The actions were tried and decided by the referee upon the theory of the defendant's negligence on each of the three occasions and the referee after lengthy trials made detailed findings of fact and conclusions of law upon which he directed the judgments for the plaintiff, wholly irrespective of the question whether under the Act of Congress of March 3, 1899, the borings were or were not authorized. He said:

> "I do not decide this question, however, as in my opinion the plaintiff's right to recover in these actions is not dependent upon the existence of a lawful permit to obstruct the navigation of the river.
>
> *Assuming that the permits issued to the Board of Water Supply of the City of New York were not authorized by law, and that the plaintiff's barges were unlawful obstructions in the river*, the defendant was not for that reason absolved from the exercise of reasonable care, and if the proximate cause of the collisions was the negligence of the defendant, it is liable for the damages sustained by the plaintiff." (pp. 417, 418.)

In the Appellate Division the majority of the Justices agreed with the reasoning of the referee though all were also of the opinion that lawful authority had been given to anchor the plaintiff's vessels in the river (p. 309).

In the Court of Appeals after referring to the referee's findings and opinion, Judge Gray writing for the unanimous court said:

> "He considered that the right of the plaintiff to recover its damages is not dependent upon the existence of an authorized permit from the Secretary of War and that it rests upon the failure of the defendant's servants to use reasonable and ordinary care in navigating the tugboats on the occasions in question.
>
> The action being at common law, while the judgment might be sustained, in my opinion, upon the theory of the referee, I, also, think * * * etc." (p. 346).

From this it is apparent that these cases were decided on the question of negligence which was considered adequate ground to sustain the judgments.

It is well settled by numerous decisions of this court that where a state court decides a case upon an independent ground not within the Federal objections taken, and the non-Federal ground is sufficient to maintain the judgment, the writ of error will be dismissed.

> Eustis *v.* Bolles, 150 U. S. 361;
> California Powder Works *v.* Davis, 151 U. S. 389, 393;
> Leathe *v.* Thomas, 207 U. S. 93, 98;
> Waters-Pierce Oil Co. *v.* Texas, 212 U. S. 112, 116;
> Consolidated Turnpike Co. *v.* Norfolk & O. V. R. Co., 228 U. S. 596;
> Adams *v.* Russell, 229 U. S. 353, 358, 359.

In Consolidated Turnpike Co. *v.* Norfolk & O. V. R. Co. (*supra*), the state court issued a certificate that a Federal question was involved in the case. Lurton, J., said:

> "Assuming, therefore, that this certificate operates to show that some Federal question was decided when the petition to rehear was refused, yet if it also appears that the judgment of the state court against the plaintiff in error was based upon a question of general law broad enough to support the decision, this court will not consider the Federal question, though it was considered and determined by the court below adversely to the plaintiff in error."

Tested by this rule, it is confidently submitted that the present cases were decided upon the ground of the defendant's negligence and the freedom from contributory negligence on the part of the plaintiff, in these cases *essentially questions of fact* and resolving both these questions in favor of the plaintiff, as must be done after the facts have been settled by the state courts, their decision alone is sufficient to sustain the judgments irrespective of how the Federal question may be decided.

Another well known doctrine which, it is submitted, is controlling here is that the Federal question must be the turning point of the case and its decision necessary for the judgment sought to be reviewed.

> De Saussure *v.* Gaillard, 127 U. S. 216, 234;
> California Powder Works *v.* Davis, 151 U. S. 389, 393;
> Seaboard Airline Ry. *v.* Duvall, 225 U. S. 477, 487;
> First Nat. Bk. *v.* Estherville, 215 U. S. 341, 346.

In *First National Bank* v. *Estherville* (*supra*), Chief Justice Fuller said:

> "In order to give this court jurisdiction of a writ of error to the highest court of a state in which a decision could be had it must appear affirmatively that a Federal question was presented for decision, that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment rendered could not have been given without deciding it".

These actions were decided by the referee wholly ignoring the Federal question and even assuming that the plaintiff-in-error was right and that the borings were not authorized under that Act. The majority of the Appellate Division agreed with the referee and the Court of Appeals has stated that the referee was right and that irrespective of any construction of the Act of 1899, the plaintiff could recover. Upon these facts it certainly cannot be claimed that the judgments depended upon the decision of the Federal question or that it was necessary to support the judgments that it be decided as it was. The alleged Federal question was only an incidental one and cannot be said to be the turning point of the cases so that under these authorities it is confidently submitted that the writs of errors should be dismissed.

POINT II.

The alleged Federal question raised by the plaintiff-in-error is wholly devoid of merit, the act of March 3, 1899, not requiring that Congress pass a special act for each minute and temporary work in navigable waters.

(a) *A Federal question must be substantial.*

It is well settled that the Federal question necessary to give this court jurisdiction must be substantial and real and not devoid of merit or frivolous.

Hamblin *v.* Western Land Co., 147 U. S. 531;
Equitable Life Assurance Society *v.* Brown, 187 U. S. 308, 311;
Gring *v.* Ives, 222 U. S. 365;
Deming *v.* Carlisle Packing Co., 226 U. S. 102, 105;
Consolidated Turnpike Co. *v.* Norfolk & O. V. R. Co., 228 U. S. 596.

(b) *The Act of March 3, 1899, does not require a special act of Congress for each structure.*

In the present cases, the claim of the plaintiff-in-error that under the act of March 3, 1899, it was necessary to get a special act of Congress passed for temporary obstructions, it is submitted is so devoid of merit and concluded by decisions of this court as to form no basis for assuming jurisdiction of these cases. The plaintiff-in-error

before the Court of Appeals claimed as it will doubtless claim here that sections 9 and 10 of the Act show the intent of Congress to absolutely exclude all structures from navigable waters without the passing of a special act of Congress, permitting them. The claim made would require even aids to navigation like buoys, and the like, to be specially passed upon by Act of Congress and would put hundreds of such administrative details upon Congress. Neither section 9 or 10 are capable of such construction. Section 9 reads in part as follows:

> "That it shall not be lawful to construct or commence the construction of any *bridge, dam, dike,* or *causeway* over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War."

The underscored words: "bridge, dam, dike or causeway", indicate, as was pointed out by the Court of Appeals that that section cannot have weight as the temporary borings here could not by any stretch of imagination be deemed analogous to a bridge, dam, dike or causeway.

Section 10 reads as follows:

> "That the creation of any *obstruction* not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, har

bor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

(c) *The Act construed from its language, history and by the Executive Departments.*

It will be observed that the first clause of this section would have to be completely isolated from the rest of the section or even be put in a separate statute to be capable of a construction which would put such a burden upon Congress. As a matter of fact it is connected wit hthe remainder of the section by a semi-colon and not separated by a period, and the next clause begins with the word "and", which shows a continuity of idea. Statutes should always be construed as a whole wherever possible.

> Market Co. *v.* Hoffman, 101 U. S. 112, 115;
> Montclair Township *v.* Ramsdell, 107 U. S. 147.

Here to construe the first clause of the section to require a Special Act of Congress in every case would make the latter clauses inconsistent and meaningless.

This section has been always construed by the Executive departments of the Government as giving the Secretary of War power when acting under its provisions to give permission for work in navigable streams without requiring any special act of Congress and the construction of a statute by the Executive Department charged with administering it has always been given considerable weight by this court.

Swigart *v.* Baker, 229 U. S. 187, 199.
United States *v.* Cerecedo, 209 U. S. 337.

The history of the statute also shows that it was never intended that special acts of Congress were required. The former General Act was Chapter 907 of the laws of 1890, which provided that obstructions not affirmatively "authorized by law" were prohibited.

The case of *United States* v. *Bellingham Bay Boom Company*, 176 U. S. 211, handed down by this court in January, 1900, established that these words meant "authorized by state, as well as by Federal Statute." It was doubtless because of the confusion in the lower Federal Courts as to the meaning of this statute that Congress in amending the law in 1899 in order to make the meaning of the statute plain changed the words "authorized by law," which were in the act of 1890 to read "authorized by Congress," the purpose evidently being to meet the interpretation which was later made in the *Bellingham* case and to assert the Federal Supremacy over the matter.

(d) *Judicial decisions construing the Act.*

That the new statute permitted the Secretary of War to determine all matters presented and

not that every minute structure in navigable waters would have to be authorized by special act of Congress appears from any decisions of this court and of other courts wherein the law has been either stated as giving the Secretary of War power to pass upon these matters or his power has been assumed to exist without argument.

Union Bridge Co. *v.* United States, 204 U. S. 364;

North Shore Boom Co. *v.* Nicomen Boom Co., 212 U. S. 406;

Monongahela Bridge Co. *v.* United States, 216 U. S. 177;

Hannibal Bridge Co. *v.* U. S., 221 U. S. 194;

Gring *v.* Ives, 222 U. S. 365;

Philadelphia Co. *v.* Stimpson, 223 U. S. 605;

United States *v.* Chandler-Dunbar Co., 229 U. S. 53;

Rogers Sand Co. *v.* Pittsburgh, Ft. W. & C. Ry. Co., 139 Fed. Rep. 7 (C. C. A. 3rd);

United States *v.* Donaldson-Shultz, 148 Fed. Rep. 581 (C. C. A. 4th).

Erie and Western Transportation Co. *v.* City of Chicago, 178 Fed. Rep. 42 (C. C. A. 7th), certiorari denied, 216 U. S. 620;

United States *v.* Lands in town of Narragansett, 180 Fed. Rep. 260;

Cummings *v.* Chicago, 188 U. S. 410;

Montgomery *v.* Portland, 190 U. S. 89.

In *Montgomery* v. *Portland*, there was a port in Portland created under the state law which Act was also approved by the Secretary of War. The Secretary of War had in 1892 under section 12 of the Act of 1890, located a harbor line within the limits of Portland and these had also been adopted by the common council of that city. In 1898 Montgomery applied to have the harbor lines relocated in front of his property and the Secretary of War ordered a hearing and the Chief of Engineers and Secretary of War acted favorably upon it, after which Montgomery started his wharf, taking advantage of the new lines. The Portland authorities then took action, claiming that the wharf would make shoal places in the river and an action was brought to enjoin Montgomery's work. The state court held that notwithstanding the permission of the Secretary of War in establishing the new harbor lines that the injunction would be granted. The court cited and approved the Cummings case (Cummings *v.* City of Chicago, 188 U. S. 410), which it stated had considered the 10th section of the River and Harbor Act of 1899, and made this quotation from the Cummings case (pp. 105-106):

> ". . . Whether Congress may, against or without the expressed will of a State, give affirmative authority to private parties to erect structures in such waters, it is not necessary in this case to decide. It is only necessary to say that the act of 1899 does not manifest the purpose of Congress to go to that extent under the power to regulate foreign and interstate commerce and thereby to supersede the original authority of the States. The effect of that act, reasonably interpreted, is to make the erection of a struc-

> ture in a navigable river, within the limits of a State, depend upon the concurrent or joint assent of both the National Government and the state government. The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the State acting by its constituted agencies."

The Court then said (pp. 106-107):

> "In this view it is unnecessary to consider the general question discussed at the bar whether Congress has or not, by some of its enactments relating to structures in navigable waters, committed to the Secretary of War the determination of matters that are legislative in their nature and which, under the Constitution, could only be determined, in the first instance, by Congress. It is sufficient now to say that the legislation upon which the defendant relies to justify the construction of the works in question does not, when reasonably interpreted, indicate any purpose upon the part of Congress to assume such complete and absolute control of the navigable waters of the United States as will make of no avail the action of the States in respect of the erection by private parties of structures in waters wholly within their respective limits.
>
> The judgment of the Supreme Court of Oregon is affirmed."

The court in the *Montgomery* and *Cummings* cases stated that the assent of the Federal Government may be given by the Secretary of War.

thus negativing any requirement that a special act of Congress was needed.

In *Union Bridge Co.* v. *United States,* 204 U. S. 364, section 18 of the Act of 1899 relating to bridges was construed. There counsel for the bridge company objected that the action of the Secretary of War in ordering changes in the bridge was an assumption of legislative power, but the court upheld it as the action of Congress, and after citing and approving *Field* v. *Clarke,* 143 U. S. 649, the court said (pp. 385-386):

> "As appropriate to the object to be accomplished, as a means to an end within the power of the National Government, Congress, inexecution of a declared policy, committed to the Secretary of War the duty of ascertaining all the facts essential in any inquiry whether particular bridges, over the waterways of the United States, *were unreasonable obstructions to free navigation.* Beyond question, if it had so elected, Congress, in some effective mode and without previous investigation through Executive officers, could have determined for itself, primarily, the fact whether the bridge here in question was an unreasonable obstruction to navigation, and, if it was found to be of that character, could by direct legislation have required the defendant to make such alterations of its bridge as were requisite for the protection of navigation and commerce over the waterway in question. But investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to free navigation and direct legislation covering each case, separately, would be impracticable in view of the vast and varied interests which require National legislation from time to time. By the statute in question Congress declared in effect that

navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span or other defects. It stopped, however, with this declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not, in any true sense, exert legislative or judicial power. He could not be said to exercise strictly legislative or judicial power any more, for instance, than it could be said that Executive officers exercise such power when, upon investigation, they ascertain whether a particular applicant for a pension belongs to a class of persons who, under the general rules prescribed by Congress, are entitled to pensions. If the principle for which the defendant contends received our approval the conclusion could not be avoided that Executive officers, in all the Departments, in carrying out the will of Congress, as expressed in statutes enacted by it, have, from the foundation of the National Government, exercised and are now exercising powers, as to mere details, that are strictly legislative or judicial in their nature."

In *Monongahela Bridge Co. v. United States*, 216 U. S. 177, this court in construing section 18 of the act of 1899, followed the rule laid down in the *Union Bridge Company case*, and reasserted that Congress could not directly legislate in each case, but that the general statute placed each particular matter in the hands of the Secretary of War for determination. The court also said (p. 195):

> "The jury might have differed from the Secretary. That was immaterial; for Congress intended by its legislation to give the same force and effect to the decision of the Secretary of War that would have been accorded to direct action by it on the subject. It is for Congress, under the Constitution, to regulate the right of navigation by all appropriate means, to declare what is necessary to be done in order to free navigation from obstruction, and to prescribe the way in which the question of obstruction shall be determined."

The rule was again asserted in *Hannibal Bridge Co.* v. *United States*, 221 U. S. 194, and in the case of *Philadelphia Co.* v. *Stimpson*, 223 U. S. 605, which was a decision under section 11, of the act relating to the establishment of harbor lines by the Secretary of War. The court made a long citation from the *Union Bridge Company* case, and then said (p. 638):

> "It must be concluded, therefore, that it was competent for Congress to provide for the establishment of the harbor lines in question for the protection of the harbor of Pittsburgh. It acted within its constitutional power in authorizing the Secretary of War to fix the lines. Union Bridge Co. *v.* United States, *supra*, (pp. 385-388); Monongahela Bridge *v.* United States, *supra* (p. 192). That officer did not exhaust his authority in laying the lines first established in 1895, but was entitled to change them, as he did change them in 1907, in order more fully to preserve the river from obstruction. And, in none of the acts complained of, did he exceed the power which had been conferred."

In *North Shore Boom Co.* v. *Nicomen Boom Company* (*supra*), the action was between two boom companies each of which had obtained authority for their booms from the secretary of war, but it was claimed that the boom of the defendant below was not authorized under the state statute and undoubtedly interfered with the plaintiff's prior boom. The court dismissed the writ of error as it held no Federal question was involved, the case turning on whether the state had given authority to the defendant company. The opinion gave the history of section 10 of the Act for 1899, and showed wherein it differed from the prior act of 1890.

In *Rogers Sanitary Co.* v. *Pittsburgh Co.* (*supra*), the court considered section 10, and the opinion stated that the approval of the War Department which had been obtained was sufficient.

In *Erie and Western Transportation Co.* v. *City of Chicago* (*supra*), wherein the writ of certiorari was denied by this court, it was assumed that the permit for the erection of the cribbing work in the waters of Lake Michigan issued by the Secretary of War was sufficient, the question turning on whether compliance had been made with its provisions in ringing a fog bell.

In *United States* v. *Donaldson-Shultz Co.* (*supra*), the defendant had been indicted for building a wharf in a navigable stream "without first getting the approval of the secretary of war", the indictment being framed under the 10th section. The court, assumed that if permission of the secretary of war had been obtained that no criminal or civil action could have been brought.

In *United States* v. *Certain lands in town of Narragansett* (*supra*), Brown District Judge said at p. 262:

> "The right to wharf out in front of the claimant's land was not absolute, but was conditional upon the recommendation of plans by the Chief of Engineers and their authorization by the Secretary of War (see Act March 3, 1899, C. 425, sec. 10)."

A case closely in point is that of *Gring* v. *Ives*, 222 U. S. 365. In that case a writ of error was obtained to the Supreme Court of North Carolina. The action was brought by the owner of a marine railway against a tugboat for running into and damaging it. The marine railway was on the shore of the Pasquotank River in the Harbor of Elizabeth City, North Carolina, and had been in existence for 18 years and projected several hundred feet into the stream in which there was a clear channel of 540 feet, and it appeared that the tug did not follow its usual channel and accordingly ran into the railway which it had passed hundreds of times. The court quoted from the opinion of the Supreme Court of the State and said (p. 369):—

> "In disposing of a contention concerning an alleged harbor line established under the act of Congress of March 3, 1899, c. 425, section 10, 30 Stat. 1121, 1151, and the proposition that the railway because it projected beyond said assumed line, was a public nuisance, and therefore the complainant was entitled to negligently and wantonly injure it, the court said (p. 138):
>
> > 'Whether there was a harbor line or not, the marine railway was a necessity for the repair of vessels. It was not shown to be located there illegally, or that it was a public nuisance; and if it had been, the tugboat was not authorized to run into it unnecessarily and negligently, as the evidence tended to show.'

The only one of the assignments of error filed at the time this writ of error was sued out which in the remotest way relates to a Federal question is the third, which is concerned with the reasoning of the court just referred to and is based upon the assumption that there could be no recovery because of the asserted establishment by the Secretary of War some time between 1900 and 1902 of a harbor line under the authority of the act above mentioned. In argument the proposition to which the assignment relates is, the court erred in not deciding that any structure projecting into the river beyond the established harbor line was illegal and a public nuisance which the plaintiff might wantonly injure or destroy. As we have seen, however, the court found as an undisputed fact that the railway in question was constructed and had been in operation many years before the establishment of the alleged harbor line. Under this condition the court was obviously right in holding that the railway had not been located in violation of the act of 1899 and was equally obviously right in deciding that the plaintiff had no right to recklessly injure it. The basis of the assumed Federal right rests upon the plainly erroneous assumption that the act of 1899 was intended to or did operate to paralyze all state power concerning structures of every character in navigable waters within their borders, and to destroy automatically all vested rights of property in such works, even although acquired prior to the act of 1899 under the sanction of state authority. Cummings *v.* Chicago, 188 U. S. 410. See also Lake Shore & Michigan Southern Ry. Co. *v.* Ohio, 165 U. S. 365.

In view of the character of the case, the facts found by the court below and the absolute want of merit in the Federal question relied upon, we are of opinion that the grounds relied upon for review are of so frivolous a

nature as not to afford the basis for the exercise of jurisdiction, and our decree therefore will be
dismissed for want of jurisdiction.

The test in the *Union Bridge* case is is the obstruction an unreasonable one? Here the court found that the channels that remained after the borings were in, even in action No. 1 were ample and sufficient for vessels and that hundreds of tows had gone through safely and two 600 and 400 feet channels were certainly sufficient for tows of reasonable length and size. The *Gring* channel of 540 feet shows what will be considered reasonable. This too, was a question of fact which is not now open to review.

(e) *The act did not apply to the temporary borings of the plaintiff.*

The further argument naturally suggests itself that these were but temporary obstructions. The testimony showed that they were removed and changed from time to time, the map, plaintiff's exhibit 32, showing a large number of borings to have been made across the river, while the testimony and the other maps, plaintiff's exhibits 6, 31 and 33, show that at the time of the respective collisions there were only 4, 3 and 2 borings in the river.

It would be obviously impractical to have sought a special act of Congress for each of these borings or even for the entire work, whose urgency and importance deserve the aid of the United States Government.

As was said by the Court of Appeals:

"If the case is one which called for permission from the Federal authori-

ties, it, rather, falls within those provisions of section 10, which leave the doing of any work modifying the capacity of channels in navigable water to the recommendation of the chief of engineers and the authorization, thereupon, of the secretary of war. The prohibition against 'the creation of any obstruction, not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States' does not apply to the case; inasmuch as, within the just and reasonable construction to be given to the language, the plaintiff was not engaged in the 'creation' of any obstruction to the navigability of the river. The intent of the statute was against the construction of structures of a more, or less, permanent nature and of the description of those particularized, unless authorized as prescribed. The plaintiff was executing a contract to test by borings the nature of the bed of the river, through which the construction of the acqueduct, or tunnel, was contemplated, and the plant used for the purpose constituted but a temporary obstructions of the river, which, upon execution of its purpose, would be removed. The intendment of the statute should not be so strictly construed as to be unfavorable to the temporary use of navigable channels in furtherance of public improvements within a state; when the permission of the proper officials of the United States government, generally, has been obtained." (210 N. Y.; Record, p. 347).

The only cases in any way holding contrary views are:

Wilson *v.* Hudson County Water Co., 76 N. J. Eq. 543;

Hubbard *v.* Fort, 188 Fed. Rep. 987.

Both of these cases involved the water pipes put under the Kill von Kull in opposition to an Act of the State of New Jersey, and the New Jersey Court and the lower Federal court held that the permit granted by the Secretary of War in defiance of the New Jersey statute forbidding the taking away of water from the state was invalid. On the other hand in the well considered case of *Maine Water Company* v. *Knickerbocker Steam Towage Company*, 99 Me. 953, the court took up section 10 or the act of 1899 and held that under it a special act of Congress was not required, but that the consent of the Secretary of War was all that the Act required.

For these reasons it is confidently submitted that there can be no doubt that the permission of the Secretary of War, granted upon the recommendation of the Chief of Engineers was the permission of the Federal Government so far as these borings were concerned, and that the claim of the plaintiff-in-error that a special act of Congress is required is so devoid of merit and concluded by previous authorities as to be frivolous.

(f) *The Secretary of War did give permission for the borings.*

The facts showing that permission was actually given by the Secretary of War were clearly brought out in the opinion of the Court of Appeals already referred to (pp. 8, 9) and were found by the referee and by the other state courts and under the doctrine that facts found in the state court are conclusive upon this court, there can be no question that as a matter of fact the permission of the Secretary of War was obtained.

The mere fact that permits were signed by the Assistant Secretary of War is immaterial. *Hannibal Bridge Co. v. United States*, 221 U. S. 194, 205; nor is it an objection that the Secretary of War having acted the formal permits were communicated to the Board of Water Supply of the City by engineer officers of the Army.

Peo. *ex rel.* Murphy *v.* Kelly, 76 N. Y., 475, affd. 109 U. S. 385.

POINT III.

Upon dismissing the writs of error, damages should be awarded as asked for in the motion.

It is now finally settled that this court has the same power to award damages on the dismissal of writs of error for want of jurisdiction as it has upon affirmance.

Deming *v.* Carlisle Packing Co., 226 U. S., 102, 107.

Comparing the record in that case with the facts in the cases at bar, it is submitted that the present writs of error are no more substantial than the writ in that case and that in the present case the alleged Federal question is equally "concluded by previous authority".

These cases have been pending since 1909, and the delay of five years caused by frequent appeals should certainly be recognized by the court as sufficient reason for compensating the defendant-

in-error for the long time required to obtain justice. After the unanimous affirmance by the highest court of the state of New York, it would seem that the further attempt to delay matters by writs of error to this court under the circumstances of these cases fully justify the court in awarding the full ten per cent. for damages which rule 23 permits.

Argument on Motion to Affirm Judgments.

The facts have already been fully stated in the argument of the motion to dismiss.

The facts were mostly contained in the findings of the referee and approved by the higher courts. These findings are, of course, final and conclusive in this court.

Kristman *v.* Miller, 197 U. S. 313, 319, and cases cited;

Jenkins *v.* Neff, 186 U. S. 230, 235;

David Lupton Sons *v.* Auto. Club of America, 225 U. S. 489.

In the Lupton case (*supra*), it was decided that the rule applies to all facts found by a referee and that this court can not review the exceptions to any findings of fact or to refusals to find any facts requested.

POINT I.

Whether the borings were nuisances and whether the plaintiff and defendant were guilty of negligence are questions of fact not open to discussion in this court.

The borings having been authorized by act of New York, (Laws 1905, ch. 724, secs. 2 and 4), they were not purprestures or nuisances *per se* (Peo. *v.* Vanderbilt, 26 N. Y., 287; Delaware, Hudson & C. Co. *v.* Lawrence, 2 Hun, 163, 181, aff'd 56 N. Y. 612).

The referee in his twelfth finding in each action decided that the channels provided for in the permits which were maintained were amply sufficient for the passage of vessels and tows and that a large number of tows and vessels had safely passed through said channels between the borings during the year 1907 and 1908 (pp. 14, 15). This proved that as a matter of fact the borings were not nuisances for it is well setled that where a structure in a navigable stream is not a purpresture, it must be found as a matter of fact to be a material injury to navigation in order to constitute a nuisance.

Delaware & Hudson C. Co. *v.* Lawrence, 2 Hun. 163, 168, aff'd on opinion below, 56 N. Y. 612;

Peo. *ex rel.* Murphy *v.* Kelly, 76 N. Y., 475, 482;

Peo. *v.* Horton, 64 N. Y. 610.

As was said in the *Union Bridge Co.* case, 204 U. S. 364, the obstruction must be unreasonable.

When the referee found on the question of negligence that the plaintiff was free from contributory negligence and the defendant was guilty of negligence in each of the three actions as a matter of fact, the question of negligence was not even open for discussion in the highest court of the state.

Reed *v.* McCord, 160 N. Y. 330.
Lewis *v.* Long Island R. R. Co., 162 N. Y. 52, 56.
Kleiner *v.* Third Ave. R. Co., 162 N. Y. 193, 198.
Ryan *v.* Franklin, 199 N. Y. 347, 348.

And this court will never review a question which the state practice does not leave open in the highest court of the State.

POINT II.

The moving vessels of the defendant were prima facie responsible for the damages.

Even apart from the conclusiveness of the findings of negligence by the referee, it appears that the anchored vessels of the plaintiff were run into by the tows of the defendant which were in motion.

It has always been held that where a vessel rightfully anchored is run into by a moving vessel that the burden of proof is upon the moving

vessel to show that she was not in any way at fault:

The Virginia Ehrman, 97 U. S. 309, 315.
The Overbrook, 149 Fed. 785.
The Oregon, 158 U. S. 186.
The Henry O. Barrell, 161 Fed. 481.
The Newburgh, 130 Fed. 321.
The Director, 180 Fed. 606.
United Engineering and Contracting Co. *vs.* N. Y., N. H. and H. R. R. Co. (unreported decision by Judge Thomas, Eastern Dist. of N. Y., Feb. 23, 1903).
The D. H. Miller, 76 Fed. 877.
Inland & Seaboard Coasting Co. *vs.* Tolston, 139 U. S. 551.
The Dean Richmond, 107 Fed. 1001.
The John Fleming, 136 Fed. 486; aff. 144 Fed. 1021.
Lind *vs.* Penn. R. R., 139 Fed. 233.
The De Gama, 150 Fed. 323.
The Wyomissing, 149 Fed. 241; aff'd 170 Fed. 1021 (C. C. A., 2nd).
Parker *vs.* Mayor, 9 App. Div., 518.
The Bailey Gatzert, 179 Fed. 44 (C. C. A.).
The Europe, 175 Fed. 596, 607.

The leading case upon this subject is the *Virginia Ehrman* (*supra*), where a dredge was working in the Delaware River, and there was a channet of two hundred feet on each side of it. Upon suit being brought the court held that the dredge was entitled to recover against both the tug and the tow which actually struck her. The court said:

> "Vessels in motion are required to keep out of the way of a vessel at anchor, if the

> latter is without fault, unless it appears that the collision was the result of inevitable accident, the rule being that the vessel in motion must exonerate herself from blame, by showing that it was not in her power to prevent the collision by adopting any practical precaution."
>
> The *Virginia Ehrman*, 97 U. S., 309, 315.

In the *Oregon* (*supra*), a vessel at anchor in a proper place with proper lights was run into by the *Oregon* and sunk. Justice Brown said:

> "The circumstances above detailed raise a presumption of fault on the part of the *Oregon*, and the burden of proof is upon her, to exonerate herself from liability."

In the *Henry O. Barrett* (*supra*), a dredge in making a new channel, anchored near the old channel, and had out lights prescribed by the Secretary of War for that special work. The Circuit Court of Appeals said:

> "Being anchored, properly lighted and without fault, the burden is on the striking vessel to exonerate itself."

It was held that the dredge could recover her entire damages.

In the *Wyomissing* (*supra*) the dredge was working near Staten Island, and there was 500 feet of water available to the side of the tug and her tow of 22 canal boats. The collision happened by a boat in the second tier striking and damaging the dredge. It was held that the tug was solely at fault for the collision, as it should have caused its tow to avoid the dredge.

In the *Overbrook* (*supra*) another dredge was at work near Staten Island in the middle of the channel and a tug with 27 loaded canal boats came along and a canal boat in the fifth tier hit the dredge. The channel available was 395 feet wide. It was held that there was ample room for the tug and tow, if properly navigated, to have gotten through safely, and that the tug was clearly at fault.

In the unreported case of the *United Engineering & Contracting Co.* vs. *N. Y., N. H. & H. R. R. R. Co.* (*supra*), it appears that similar borings to the ones in question were being made in the East river prior to the construction of the subway. The Court held that the libellant was making the boring by *proper authority*, and that there was no excuse for the collision, and that so far as the court had jurisdiction of the damage done it would award a decree in favor of the Contracting Company.

In the *D. H. Miller* (*supra*), a dredge in Boston Harbor was injured by a vessel running into it. It was urged on behalf of the moving vessel that the *tide* caused the collision, to which the Circuit Court of Appeals replied that the tide should have been known to the steamer and cited upon this point the well known case of *The Britannia*, 153 U. S. 130.

In the *Dean Richmond* (*supra*), the Court held that the excuse of the moving vessel, that the tide had caused the collision, would not be accepted, and a decree in favor of the moored vessel (103 Fed. 701) was affirmed (107 Fed., 1001).

Numerous other cases might also be cited that a miscalculation as to the tide will not be considered a valid excuse to a moving vessel. The

courts of New York have followed the rules laid down by the Federal Courts.

A case in point is that of *Parker* vs. *Mayor* (*supra*). In that case a vessel while being towed got adrift and was brought down by the tide against the plaintiff's vessel which was moored at a dock. The Court below charged that the burden of proof was upon the plaintiff to show some negligence on the part of the defendant. It was held by the Appellate Division that this was not the law, but that the burden was upon the defendant, under the circumstances, to show iteslf free from negligence. Van Brunt, P. J., said:

> "It is undoubtedly true, that where a moving vessel collides with a vessel which is moored to a wharf, the burden of showing that the collision was caused by inevitable accident is upon the defendant."

Under these authorities there can be little doubt that the defendant must be held at fault as the plaintiff complied with the government's permit, had up proper lights, there was no fog, and there was no reason why the collision should have happened when hundreds and thousands of vessels in all weathers had all gone past with perfect safety. The main cause of the collisions was a change of course and an improper allowance for the tide and in the cases above cited and in every case where the question has been presented, it has always been held that ignorance of the effect of the tide or improper allowance for the known action of the tide were no excuses to moving vessels.

In addition to the cases cited there may be mentioned the case of *Ross* v. *Cornell Steamboat Company*, 149 Fed. 196.

In the Ross case it is true that the dredge was also held in fault but there the dredge had steam power and could easily have moved out of the channel after her day's work was over. The channel there was only three hundred feet wide and the Cornell tow was a quarter of a mile long. There as here the tug passed safely, and there as here the tow swung crosswise and hit the dredge. It was held that the tow was clearly at fault for having a too long and unwieldly tow. The Court said that the tug knew the position of the dredge, the narrowness and bend in the channel, and the force of the tide.

POINT III.

Even conceding that the plaintiff's vessels and borings were improperly in the channel, the want of care in navigating defendant's tows required judgments for the plaintiff.

A number of cases have held that a tug must calculate and prevent her tow from swinging.

The Colonel John F. Gaynor, 130 Fed. 856,
The Bee, 138 Fed. 303,
Rebstock *vs.* Gilchrist Transportation Co., 132 Fed. 174.

The rule of law as to the care that must be taken by moving vessels and particularly by moving tows is so strict that, if in this case the plaintiff could by any possibility be said to have ex-

posed itself to danger in maintaining the drills and scows where it did—the defendant's captains knowing the conditions and difficulties were bound to so navigate that they would not strike and injure the borings. If 27 canal boats was more than a single tug could handle properly they should have reduced the number of boats in their tow, or else have required the helper tug to assist in the navigation.

It has always been held that even when a plaintiff has placed himself in a condition of danger, yet if the defendant by exercising ordinary care could have avoided injury to the plaintiff, the plaintiff may recover. This rule has been frequently applied by this and lower Federal courts:

Grand Trunk Ry. Co. *v.* Ives, 144 U. S. 408, 429;

Inland & Seaboard Coasting Co. *v.* Tolson, 139 U. S. 551;

Herr *v.* St. Louis & S. F. R. Co., 174 Fed. Rep. 938, 943 (C. C. A.);

The Plymouth, 186 Fed. Rep. 108 (C. C. A. 3rd);

Clunn *v.* City and Suburban Railway, 207 U. S. 302, 309.

In *Inland & Seaboard Coasting Co.* v. *Tolson*, (*supra*), the plaintiff was standing near the end of the wharf and beckoned to a vessel to come in and get some freight. The vessel came in too hard and broke the wharf and injured the plaintiff. The court instructed the jury that the day being calm and the water smooth, the violent hitting of the wharf was *prima facie* proof of negligence on the part of the boat. This Court said (p. 555):

> "As such damage to a wharf is not ordinarily done by a steamboat under control of her officers and carefully managed by them, evidence that such damage was done in this case was *prima facie* and if unexplained sufficient evidence of negligence on their part and the jury might properly *be so* instructed".

As to contributory negligence, the Court held that even if the plaintiff by standing was negligent, yet the officers of the boat *knew where he stood* and would

> "have avoided injuring him if they had used reasonable care to prevent the steamboat from striking the wharf with unusual and unnecessary violence. If such were the facts, the defendant's negligence was the proximate, direct and efficient cause of the injury." (p. 559).

In *Grand Trunk Railway Co.* v. *Ives*, 144 U. S. 408, 429, plaintiff's intestate was killed in Detroit by a railroad train. The Court said:

> "Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured; subject to this qualification which has grown up in recent years (having been first enunciated in Davies *v.* Mann, 10 M. & W. 546), that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and

prudence, have avoided the consequences of the injured party's negligence".

Inland & Seaboard Coasting Co. *v.* Tolson, 139 U. S., 551, 558, cited and approved.

In Clunn *v.* City & Suburban Railway, 207 U. S., 302, 309, Moody, J., said:

"If she (the plaintiff) carelessly placed herself in a position exposed to danger, and it was discovered by the defendant in time to have avoided the injury by the use of reasonable care on its part, and the defendant failed to use such care, that failure might be found to be the sole cause of the resulting injury".

Inland & Seaboard Steamboat Co. v. Tolson, 139 U. S. 551, and

Grand Trunk *v.* Ives, 144 U. S. and other cases and text writers cited.

State authorities are to the same effect:

Austin *v.* N. J. Steamboat Co., 43 N. Y., 75;
Silliman *v.* Lewis, 49 N. Y., 379.

In *Austin* vs. *N. J. Steamboat Co.* (*supra*) there was a collision in the Hudson River where the channel was between three and five hundred feet wide. The MacDonald with some barges going up the river got aground at the edge of the channel. The steamer St. John came along and attempted to pass to the east of the MacDonald when she sheered suddenly and hit a barge of the MacDonald tow. Church, C. J., said, p. 81:

"It is also claimed by the defendant that the negligence of the plaintiff contributed to

the injury on two grounds. First, that the tow was in the wrong place and had committed the same fault alleged against the defendant in endeavoring to sail east of the actual channel, and was guilty of negligence in running aground, which contributed to the injury. The tow was grounded several hours previous, and was entirely helpless at the time of the accident. Those in charge of the St. John had a full view of the tow and knew her condition before leaving the dock at Albany, and all the way to where it lay, and the evening was clear and moonlight. The *St. John* and all other passing vessels were bound to regard the actual situation of the tow and to exercise reasonable care to prevent injury. It is not pretended that the tow did anything to affect the action of the *St. John;* it simply lay still; and it is no defense, that some hours previously she had grounded through carelessness. It cannot be said in such a case that the plaintiff's negligence contributed to the injury. The negligence must be *proximate* and not *remote*. It must be a negligence occurring at the time the accident happened. Notwithstanding the previous negligence of the plaintiff, if at the time when the injury was committed it might have been avoided by the defendant by the exercise of reasonable care and prudence, an action will lie for the injury. (18 N. Y. 256, per Harris, J., Davies *vs.* Mann, 10 M. & W. 545; Haley *vs.* Earle, 30 N. Y. 208; 24 Verm. 487; Cummins *vs.* Spruance, 4 Harr 315)."

In *Silliman* vs. *Lewis (supra)* there was a collision between a schooner and the plaintiff's barge while in tow. The barge had improper lights which looked like anchor lights and the court below directed a non-suit. This Court held that if the defendant knew the true state of facts the improper lights on the plaintiff's boat would

not be a defense for then the schooner might have avoided the collision by taking reasonable care, for in that case the fact that plaintiff was negligent in having the wrong lights would not legally be the *proximate* cause of the injury. The *Austin* case was cited and approved.

The cases very strongly in point are:

> Gring *v.* Ives, 222 U. S. 365, (already referred to),

where it was held that the tug was solely responsible for running into the marine railway even although it unlawfully ran beyond the harbor lines; and the case of the

> Edmund D. Levy, 108 Fed. Rep. 435, aff'd 144 Fed. Rep. 664 (C. C. A. 2),

wherein it was held that a Cornell Steamboat tow was solely at fault for running into an unlighted wreck in the center of the channel of the Hudson river, of whose existence it had full knowledge.

POINT IV.

Damages for loss of profits were properly awarded in Action No. 3.

There was no question raised in the state court as to the damages in actions 1 and 2 or even as to the loss of property in action 3, but it was insisted that profits were improperly permitted to be included in the judgment. The facts concerning the profits which showed beyond question that they were reasonably certain are contained

in the findings of the referee (p. 187). These show in detail what the plaintiff would have received from the city for completing the borings, what it would have cost, and the result was a mere matter of arithmetic. The findings were based on uncontradicted testimony of experts. The referee found all the facts that are necessary, thus bringing the case directly within the rule laid down by this court in *Anvil Mining Co.* v. *Humble*, 153 U. S. 540, 549-550.

This case has been frequently cited and was recently reaffirmed in Fidelity Co. *v.* Bucki Co., 189 U. S. 135, 142; Roehm *v.* Horst, 178 U. S. 1, 15; Weinman *v.* DePalma, 232 U. S.

Cases in the state courts, wherein the same rule was applied are:

Schile *v.* Brokhaus, 80 N. Y. 614;
Hall Sons Co. *v.* Sundstron & Stratton Co., 138 App. Div. 548, aff'd 204 N. Y. 660;
Wakeman *v.* Wheeler & Wilson Mfg. Co., 101 N. Y. 205;
Fredonia Gas Co. *v.* Bailey, 94 Pac. (Kansas) 258;
McConnell *v.* Corona City Water Co., 149 Cal. 60.

Conclusion.

Upon the whole record, it is submitted, that the three cases do not present any Federal question necessary to the decision of the case, but turn on the question of negligence, and that the Federal question is not a real one, and that upon the motion to affirm even conceding that a Federal ques-

tion is present, the decision of the Court of Appeals is so clearly right as to not require further argument.

Upon a large number of the points presented the case of *Gring* v. *Ives*, 222 U. S. 365, wherein the motion to dismiss for want of jurisdiction was granted seems to be conclusive.

Dated, April 6, 1914.

E. Crosby Kindleberger,
Counsel for Defendant-in-error,
2 Rector St.,
Borough of Manhattan,
New York City.

FILED
APR 27 1914
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1913.

Nos. 933, 934, 935

CORNELL STEAMBOAT COMPANY,
Plaintiff-in-Error,

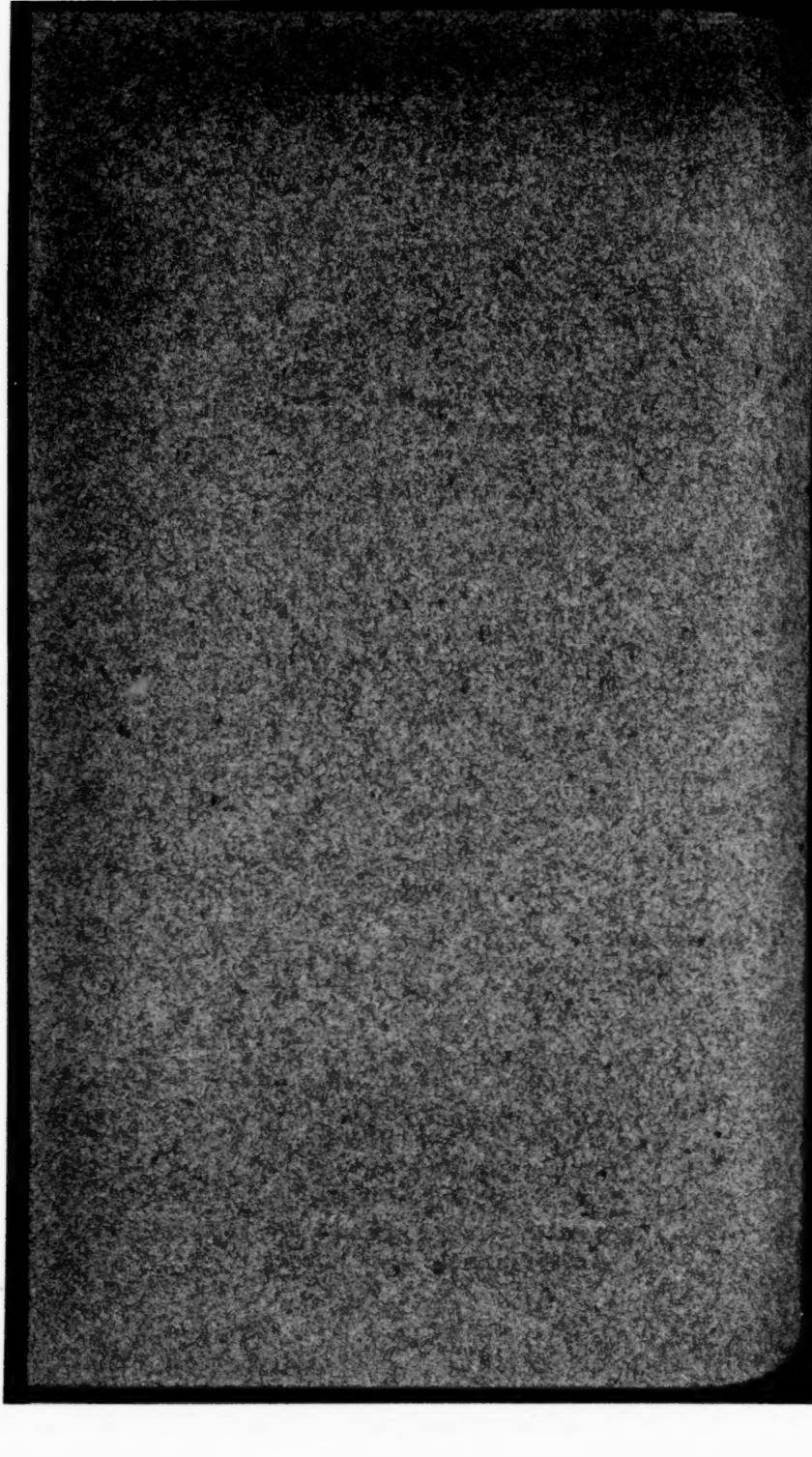
AGAINST

PHOENIX CONSTRUCTION COMPANY,
Defendant-in-Error.

BRIEF FOR PLAINTIFF-IN-ERROR IN OPPOSITION TO MOTION TO DISMISS FOR LACK OF JURISDICTION OR TO AFFIRM JUDGMENTS BELOW.

J. PARKER KIRLIN,
Counsel for Plaintiff-in-Error.

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SUPREME COURT OF THE UNITED STATES.

CORNELL STEAMBOAT COMPANY, Plaintiff-in-error, (Defendant below)	Actions I, II, III, October Term, 1913, Nos. 933,934, 935.
AGAINST	
PHOENIX CONSTRUCTION COMPANY, Defendant-in-error. (Plaintiff below)	

BRIEF FOR PLAINTIFF-IN-ERROR IN OPPOSITION TO MOTION TO DISMISS, OR AFFIRM JUDGMENTS.

These three cases have been brought to this Court by writs of error from the Supreme Court of the State of New York, after the judgments for the plaintiff, awarded by the referee to whom the cases were sent, for $4,146.58, $4,432.52 and $9,908.36 (pp. 26, 136, 197), were unanimously affirmed by the Appellate Division of the Supreme Court, State of New York (pp. 293, 294), and by the Court of Appeals, the highest Court of the state (pp. 317, 320).

The actions were instituted to recover damages for the injuries done to certain temporary borings erected by the plaintiff below in the Hudson River, through collision with defendant's tugs and canal boats, navigating the river, on

three separate occasions in 1908. The plaintiff contended that the borings had been erected under proper authority, and that the injuries complained of had been sustained entirely through the negligence of the tugs of the defendant. The defendant claimed that the borings were obstructions to the navigable waters of the Hudson River and denied that the structures had been properly authorized and denied any negligence on its part.

The cases were tried before a referee who found that the borings had not been properly authorized; but that the defendant had nevertheless been guilty of negligence and should be held liable even though the borings were unauthorized. The judgments entered by the Supreme Court upon his findings were affirmed by the Appellate Division of the Supreme Court, two of the justices concurring on the ground that the borings were unauthorized. The Court of Appeals of the State of New York affirmed the judgments on the express ground that the borings did not need the authority of Congress and that they were authorized by the Secretary of War.

The borings in question were being made by the plaintiff, as the contractor for the Board of Water Supply of the City of New York, to determine where it would be best to tunnel under the Hudson, in the construction of the new Catskill Aqueduct. The work had been authorized by the New York State Act of 1905; but no Act of Congress had ever been passed authorizing the borings nor was it proven that the Secretary of War of the United States had authorized them upon recommendation of the Chief of Engineers.

ASSIGNMENTS OF ERROR.

The assignments of error in the three cases are identical. They allege that the Courts of New York erred in refusing to give the defendant an immunity claimed under the Act of Congress of March 3, 1899, in deciding:

(1) That the structures of the plaintiff were not unlawful obstructions of the channel of the Hudson River.

(2) That the defendant was liable to the plaintiff for damages to the structures.

(3) That the plaintiff had authority from the Secretary of War to erect and maintain the structures and borings in the channel of the river and did not need the authority of Congress.

(4) That the structures or borings of the plaintiff were not obstructions to navigation within the meaning of said Act of 1899.

(5) In giving the judgment to the plaintiff, where by the law of the land it should have been given to the defendant.

The Federal question raised, that the New York Courts failed to give the defendant the immunity it claimed under the Act of Congress of March 3, 1899, is controlling on all of the assignments of error. The cases could not be properly decided without involving this Federal question, and since the defendant claims that this question was improperly decided by the State Courts, under a wrong construction of the Statute, the cases are properly before this Court, and the writs of error should not be dismissed.

FACTS.

In all three cases, the Referee found that on the three nights on which the collision occurred, the captains of the defendant's tugs had been negligent in fixing the courses of their tows too close to the borings of the plaintiff, without making proper allowance for the tide which was at strong ebb at the time, neither of these faults being alleged in the complaints; that in each case, a short time before the collision, the course of the tug was sharply changed to the eastward, that this swung the tail end of the tow to the westward, closer to the boring in each instance; that this change of course under the circumstances was negligent; and that it was one of the causes of the collision. (Pp. 16, 17; 122, 123; 185, 186).

These were the only faults found on the part of the defendant's tugs.

It was proved that each tow was made up in a proper and customary manner in charge of a powerful tug, easily capable of handling the tow, and in command of an experienced captain. (Pp. 72, 73; 122, 123; 211, 212.)

In all three actions, it was found that Plant *No. 21* was anchored in the usual and customary course that tows navigated in passing this place in going down the river on an ebb tide. (Pp. 19, 126, 188.)

The Referee found that the plaintiff had failed to show any lawful authority to maintain its borings in the Hudson River, at the times of the several accidents, either under any Act of Congress, or under any lawful permit obtained by it or the Board of Water Supply of New York City, from the Secretary of War of the United States. (Pp. 19, 126, 188.)

Nevertheless, the Referee found that because of the negligence of the tugs, the defendant should be held liable for the damages sustained by the plaintiff's plants from the collisions. (Pp. 17, 125, 188.)

FIRST POINT.

THE FEDERAL QUESTION INVOLVED MUST NECESSARILY BE THE BASIS OF THE DECISIONS IN THESE CASES.

A. The Court of Appeals of the State of New York did actually decide these cases on the basis of the Federal question involved.

The appeal to that court was based on the ground that the Court below had erred in failing to hold on the findings that the borings erected by the plaintiff were unlawful obstructions to the navigation of the Hudson River, and that accordingly the plaintiff, as a wrongdoer who had built a nuisance in the navigable channel could not recover damages for injury to the structure in the absence of a finding of wilful fault.

The Referee found as a matter of fact that the structures erected in the river by the Construction Company were not properly authorized, and were, therefore, unlawful; but he further found as a matter of law, that the plaintiff should nevertheless be allowed to recover on account of the defendant's negligence.

In the decision of the Court of Appeals, Judge Gray, handing down the opinion of the Court (210 N. Y., 113, at p. 118), says concerning the judgment of the Supreme Court founded on the findings of the Referee, Record, p. 346:

"The action being at common law, while the judgment might be sustained in my opinion upon

the theory of the Referee, I also, think that his findings as to the granting of the application of the board of water supply by the secretary of war, upon the recommendation of the chief of engineers, and as to the subsequent permits in modification of the original permission, considered in connection with the documents themselves, which evidence the action of the Federal officials, do, sufficiently, establish that the board had authority to make the test borings, in question, and show that the plaintiff was lawfully at work in the river, Section 9 of the Act of Congress of March 3rd, 1899, makes it unlawful. * * *"

The Court thereupon discusses this statute and its bearing upon these cases deciding that the Construction Company had complied with all the conditions imposed by the statute for obtaining permission to erect the obstructions in the river; and that under the Court's interpretation of the Statute the Construction Company did have proper authority to erect the borings where they did.

The only point discussed by the Court of Appeals and the only one at issue before them, was this question of the Steamboat Company's rights under the proper construction of the United States Statute, and it was solely upon the construction of this Federal question that the Court of Appeals based its decision.

In concluding his opinion, Judge Gray says, at p. 121:

"I have reached the conclusion, upon the question discussed, that no defense was made out of an unlawful obstruction of the channel of the Hudson River and as no other question requires consideration, I advise that the judgments appealed from be affirmed."

B. The judgment of the Supreme Court that these cases could be decided solely on the ground of the defendant's negligence and the dictum in the opinion of the Court of Appeals to the same effect were erroneous, and the Federal question raised by the defendant is necessarily involved in the decision.

(1) Where the issue raised by the question of Federal Statute is controlling in the decision of the suit, as in this case the Supreme Court will take jurisdiction of the case on a writ of error.

This rule is stated in the case of *Murdock* v. *City of Memphis*, 20 Wall., 590, where the Court said at p. 636:

"If it was erroneously decided against plaintiff-in-error, then this Court must further inquire, whether there is any other matter or issue adjudged by the State court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue.

"But if it be found that the issue raised by the question of Federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, or that there has been no decision by the State Court of any other matter or issue which is sufficient to maintain the judgment of that court without regard to the Federal question, then this court will reverse the judgment of the State court, and will either render such judgment here as the State court should have rendered, or remand the case to that court, as the circumstances of the case may require."

(2) The Federal question involved in these cases is controlling upon the decisions.

In Article Six of its answer in each of these cases the defendant set up as a defense the fact that the structures had been erected unlawfully in the Hudson River by the plaintiff. *Record*, pp. 11, 117, 180.

The defendant claims an immunity granted by a Statute of the United States; and even if the Court below attempted to base its decision upon the defendant's negligence, it could not properly make negligence the sole ground for a recovery under a correct construction of the Statute.

The Supreme Court erred in holding that even though the Construction Company had unlawfully erected its structures in the Hudson River the Steamboat Company could still be held liable for the damage on the ground of negligence.

It is well settled that one who erects a structure which is a public nuisance cannot recover damages for any injury to the structure in the absence of wilful fault. *Montgomery* v. *Portland*, 190 U. S., 89; *Cummings* v. *Chicago* 188 U. S., 410; *Hart* v. *Mayor, etc.*, 9 Wend., 571; *Moore* v. *Commissioners*, 32 How. Pr., 184; *Blanchard* v. *W. U. Tel. Co.*, 60 N. Y., 510; *Moore* v. *Jackson*, 2 Abb. (N. C.), 211; *Gold* v. *Carter*, 9 Humph., 369; *Garey* v. *Ellis*, 1 Cush., 306; *Rathbun* v. *Payne*, 19 Wend., 399; *Foley* v. *McKeever*, 56 App. Div. (N. Y.), 517.

Garey v. *Ellis*, 1848, 1 Cush. 306, was an action on the case against the defendants for negligence in running their vessel against a building belonging to the plaintiff and injuring it.

The defense was placed on two grounds, first, that the building extended beyond and projected

over the line of the harbor of Boston, as established by commissioners, under the Acts of 1837, c. 229, and 1840, c. 35, and was a nuisance; and second, that the building extended over the channel of the harbor and below low-water mark.

By the Court:

"By the law, as it stood before the passing of the statutes of 1837, c. 229, and 1840, c. 35, any building beyond the line of low water mark, upon navigable tide waters, was an encroachment upon public right, and if it obstructed navigation, was a public nuisance. The building, which is the subject of the alleged injury in the present case, is found by the jury to be below low water mark, and to be an obstruction to navigation. The plaintiff, being herself a wrongdoer, in having her buildings there, can maintain no action for the alleged damage."

In the case of *Haskell* v. *New Bedford*, (1871) 108 Mass., 208, Mr. Justice Gray, then a judge of the Supreme Judicial Court of Massachusetts, reaffirmed the doctrine of the foregoing case in these terms:

"The first cause of action alleged in the suit at law is for entering on the plaintiff's close, and forcibly pulling up a post standing there, and preventing him from placing a building upon the close. * * *

"No evidence was offered, whether the place in question was or was not a public highway. If it was, the building and post were public nuisances, and the plaintiff had no right of action for their exclusion or removal from the street."

The case of *Garey* v. *Ellis*, 1 Cush, 306, was expressly cited and referred to as authority for this proposition.

Rathbun v. *Payne*, 1838, 19 Wend. 399, was an action on the case for negligence in running down the plaintiff's canal boat which did not have the lights required by the rules. The Judge charged that if the defendant might have avoided the collision by the exercise of ordinary skill and had not done so, he was liable. After verdict for the plaintiff, a new trial was granted. The Court said:

"So, too, if the loss was chargeable partly to the want of lights on the bow of the *T* (plaintiff's canal boat) the defendants would not be answerable for anything short of gross negligence on their part."

And with reference to the allegation that the plaintiff's vessel was on the wrong side of the canal, the Court said:

"If the position of the plaintiff's boat was not the result of fault on their part, it was nevertheless their misfortune, and they cannot throw off the consequences on another."

A case almost on all fours with the case at bar was *Foley* v. *McKeever*, 1900, 56 A. D., 517. A launch was moored to a pier and in addition had an anchor out forward with 125 feet of cable, contrary to the regulation of the Treasury Department, prohibiting anchoring outside of certain limits. A steam lighter, loaded, while turning in the slip came into collision with the launch. In the dissenting opinion, it is remarked that there is evidence that the lighter could have avoided the collision by the exercise of proper care. The Court, nevertheless, affirmed the nonsuit below.

In the case of *Blanchard* v. *Western Union Tel. Co.*, 60 N. Y., 510, the Court said at p. 517:

"The claim that the plaintiffs were guilty of contributory negligence cannot be sustained. Indeed, the question is not in the case. The plaintiffs were lawfully navigating the river, in the usual manner, with a proper vessel, well manned and cared for, and, as against the defendant, had the exclusive right to the channel. The defendant was a wrongdoer, and the fact that, on other occasions, vessels had felt the cables of the defendant, receiving no injury from them, did impose upon navigators the duty of changing the structure of the vessels, or to feel their way to avoid a collision. They did not navigate the river at their peril because of the knowledge of these casual contacts. Had the plaintiffs run their boat knowingly and rashly, into dangers foreseen or known to them, the case would be different. They might, in that case, have been debarred of their action within the maxim *volenti not fit injuriae*. There was no satisfactory evidence of any defect in the plaintiff's steamer; certainly none that they had any knowledge of such defects, if any existed. The evidence does not necessarily lead to the conclusion that the "scag" was loose. It could not have been so loose as to have rendered her unfit for navigation. But if it were so, it is no justification to the defendant, provided it was not so loose as to interfere with the cable if properly laid. The plaintiffs were not compelled to keep their boat in the best possible repair and condition as against a wrongdoer."

It is not possible, therefore in the present actions to hold the Steamboat Company liable merely on the ground of negligence if the Construction Company, in erecting the structures which were injured, was guilty of maintaining a

nuisance. There is no hint or finding anywhere in the proceedings below that the steamboat people were guilty of wilful negligence.

There is no question but that these obstructions to navigation in the Hudson River, of which these borings erected by the Construction Company were nuisances if they were not properly authorized.

North Shore Boom Co. v. *Nicomen Boom Co.*, 212 U. S., 406; *People* v. *Vanderbilt*, 26 N. Y., 287; 28 N. Y., 396; *People* v. *Horton*, 64 N. Y., 610; *Woodman* v. *Kilborn Mfg. Co.*, 30 Fed. Cas., No. 17978; *Hart* v. *The Mayor of Albany*, 9 Wend. 571.

In any event, then, the decisions in these cases must involve the interpretation of the Statute under which the Construction Company claims to have had authority to erect the borings. It is this question of authority under the Statute, which the Steamboat Company has raised throughout the proceedings in these suits, and it is fundamental and the very basis of the decisions. Certainly, under the authority of *Murdock* v. *City of Memphis, Supra*, the Federal question thus raised is of such a controlling nature that this Court should take jurisdiction, and the writs of error should not be dismissed.

SECOND POINT.

THE FEDERAL QUESTION INVOLVED IS PROPERLY PRESENTED BY THE WRITS OF ERROR TO THIS COURT.

A. The immunity claimed by the plaintiff-in-error under a proper construction of the Act of Congress of March 3rd, 1899 (U. S. Comp. Stat.

1901, pp. 35-41) presents a substantial Federal question to this Court.

The Steamboat Company has throughout these proceedings based its defense on the ground that the Construction Company did not have authority to erect its borings in the Hudson River, and that, therefore, the former could not be held liable even for negligence on the part of its tugs, so long as that negligence was not wilful. It follows that the Steamboat Company claims under this statute the right to have the navigable channel of the Hudson free from any obstructions, and the Court of Appeals in denying this right, denied an immunity which was claimed under a United States Statute. It is on the ground of the denial of this immunity that the plaintiff-in-error has properly sued out the writs of error to this Court.

1. There can be no doubt that where a person claims a right under a Federal statute to carry on his business in a certain way, and this right is denied him by any Court, the question whether or not he has been deprived of his right or immunity is one which this Court is authorized to pass on.

Section 709 of the Revised Statutes of the United States, provides for appeals to the United States Supreme Court from the final judgment and decrees of a State Court "where is drawn in question the construction of any clause of the constitution of a treaty or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party under such clause of the constitution treaty statute or commission."

It is upon this section of the Revised Statutes that the jurisdiction of the Supreme Court in such cases rests. *Smalley* v. *Langenon,* 196 U. S., 93.

The jurisdiction of the Supreme Court of the United States, thus provided for, has been repeatedly recognized. Among the cases most in point are *Belden* v. *Chase,* 150 U. S. 674; *Railroad Company* v. *Maryland,* 21 Wall. 456; *Missouri, etc. Co.* v. *Haber,* 169 U. S. 613.

Belden v. *Chase,* 150 U. S. 674, was an action at law against William Belden, owner of the Yacht *Yosemite,* for negligent navigation of the yacht so as to run down and sink the steamboat *Charlotte Vanderbilt* in the Hudson River. In the State Courts, the plaintiff Chase, claimed that the yacht was not carrying proper lights under the State Statute. Belden claimed exemption from liability, proving that the yacht carried a fore mast light, and the red and green side lights as required by Act of Congress of vessels navigating the Bays, Lakes, Rivers and other inland waters of the United States. The highest State Court decided in favor of the plaintiff, Chase, and defendant appealed to the United States Supreme Court. Held on the question of the jurisdiction, that the defendant had been denied a right under the Federal Statute and that this right having been denied by the State Court, the question was one over which the United States Supreme Court had jurisdiction as involving Federal statute.

At page 690, Mr. Chief Justice Fuller says:

"The plaintiff-in-error expressly claimed the right under the statutes of the United States to navigate the *Yosemite* on the Hudson with a

mast head light and side lights in accordance with the statutory rules and also the right in such navigation to the application of those rules in certain other particulars; and if these rights were denied or either of them, the jurisdiction (of this Court) attached for the determination of the questions thus raised."

In *Railroad Company* v. *Maryland,* 21 Wall. 456, the Railroad Company had stipulated in its charter from the State of Maryland that the Company should pay to the State a bonus or portion of its earnings. When the State attempted to collect the bonus the railroad refused to pay, defending on the theory that such a stipulation was illegal as a tax upon interstate commerce. Held that the stipulation was not repugnant to the Constitution of the United States but that as the alleged unconstitutionality of the stipulation was set up as a defense, the State Court was bound to pass upon it; and having decided against the exemption of this claim, this Court is authorized to review the decision.

In *Missouri, etc., Co.* v. *Haber,* 169 U. S., 613. the plaintiff, Haber, sued the railroad in the State Court under the State Statute, forbidding the bringing into the State of cattle, liable or capable of communicating Texas splenic or Spanish fever to any domestic cattle of the State. The Railroad claimed an exemption from the State Statute, in that it was unconstitutional because it was a restraint upon Interstate Commerce.

The State Court gave judgment for Haber and the railroad appealed to this Court and it was held that the State Statute was not unconstitutional, but since the defendant had been denied

a right claimed under a Federal Statute, this Court has jurisdiction over the question.

At page 621, the Court says:

"The answer of the Railroad Company—shows that the company contended throughout this litigation that legislation by Congress and the regulations prescribed by the Secretary of Agriculture in the execution of the animal industry Act, furnished a complete defence to all the claims for damages asserted in this action—the State Court could not properly have disposed of the case without deciding the Federal question raised by the Company. This Court, therefore, has jurisdiction to inquire whether the Supreme Court of Kansas erred in holding that the legislation of Congress and the regulations of the Secretary of the Interior gave the Railroad Company the right, privilege and immunity specially set up and claimed by it."

2. Where it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction the case is one arising under the laws or constitution of the United States. *Cooke* v. *Avery*, 147 U. S., 375; *Oil Company* v. *Miller*, 97 Fed., 690; *Northern Pacific Railway Co.* v. *Soderberg*, 188 U. S., 526.

In the case of the *Northern Pacific Railway Co.* v. *Soderberg*, 188 U. S., 526, at p. 528, Mr. Justice Brown said:

"If the case made by the plaintiff be one which depends upon the proper construction of an Act of Congress with the contingency of being sustained by one construction and defeated by another, it is one arising under the laws of the

United States. *Doolan* v. *Carr*, 125 U. S., 618; *Cooke* v. *Avery*, 147 U. S., 375. Under the allegations of the bill the fact that the Land Department had not determined whether the land in question was mineral or non-mineral, does not involve a question of fact, as the facts are admitted, but solely a question of law whether land valuable for its granite is mineral or non-mineral, under the terms of the grant."

A similar condition exists in these present cases. There is no question of fact left open as to what steps the Construction Company took to obtain the necessary authority to erect its borings in the Hudson River. Exs. 1, 2, 3, pp. 235, 236. But the defendant raises the question whether the proper authority was actually obtained under the Federal Statute, and the answer to this question must be "Yes" or "No," according to the construction which this Court places upon the Statute.

B. The immunity claimed by the defendant is sustained by a proper construction of the Statute.

Since the enactment of the Act of Congress of March 3rd, 1899 (Vol. II, Supp. of R. S., p. 996; U. S. Comp. Stat., 1901, pp. 35-41), the creation of any obstruction in the navigable waters of the United States, except in rivers or other waterways, the navigable portions of which lie wholly within the limits of a single State, is prohibited, unless affirmatively authorized by Congress.

Sections 9 and 10 of that Act, which alone are material here, read as follows:

"Sec. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway, over or in any port, roadstead,

haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War.

"*Provided*, that such structures, may be built under authority of the legislature of a State across rivers and other causeways the navigable portions of which lie wholly within the limits of a single state, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced:

"*And provided further*, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.

"Sec. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited;

"And it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War;

"And it shall not be lawful to excavate or

fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same."

It will be seen that the two sections cover the whole subject of structures to be erected in or across navigable waters, and provide when such structures may and when they may not be constructed without the previous consent of Congress.

Section 9 permits a limited and specified class of structures to be built under authority of the Legislature of a State, without the consent of Congress, but with the consent of the Chief of Engineers and the Secretary of War.

This permission extends only to "bridges," "dams," "dikes" or "causeways" erected "across rivers or other waterways," the navigable portions of which lie wholly within the limits of a single State. In all other cases such structures are unlawful unless the consent of Congress to their construction shall have been first obtained.

Section 10 places under the exclusive jurisdiction of Congress, the control of all structures which may constitute obstructions to the navigable capacity of any of the waters of the United States.

Reading the two sections together, it seems apparent that the 10th Section clearly places under congressional jurisdiction all rivers like

the Hudson, whose navigable waters do not "lie wholly within the limits of a single state." The right to create obstructions to the navigable capacity of channels must (a) be first authorized by Congress and (b) even then, if the structure is to stand in navigable waters, the plans must be approved by the Chief of Engineers and authorized by the Secretary of War. Action by the Chief of Engineers and Secretary of War, under the second and third paragraphs of Section 10 is obviously conditioned on a prior authorization of the works by Congress.

THIRD POINT.

THE MOTION TO AFFIRM IS PREMATURE, AND SHOULD NOT BE GRANTED BEFORE THE CASES HAVE BEEN REVIEWED UPON THE WRITS OF ERROR.

The motion to affirm is based largely on the same grounds as the motion to dismiss, to wit: that the question raised by the defendant is wholly devoid of merit. To dismiss or affirm at this time it must be apparent that the question raised by the appeal is frivolous, or so well settled as to leave no doubt upon it. This Court must be satisfied by the plaintiff that his case is so absolutely free from doubt that it can say there is no reasonable ground on which it can continue the proceedings. *Steel* v. *Culver*, 211 U. S., 26; *Micas* v. *Williams*, 104 U. S., 556; *Jenkins* v. *Banning*, 64 U. S., 455; *Welmer* v. *Bauer*, 160 Fed., 240.

The plaintiff has made no such clear case here. It has cited no authority for the construction which it places upon the statute in ques-

tion. Most of the authorities cited in its brief upon this point do not as a matter of fact involve the interpretation of §10 of the Act of Congress of March 3, 1899, under which the defendant claims its immunities.

In *Philadelphia Company* v. *Stimson*, 223 U. S., 605, cited by the plaintiff, the Court says at p. 635:

"It is for Congress to decide what shall or shall not be deemed in judgment of law an obstruction of navigation. *Pennsylvania* v. *Wheeling, etc., Bridge Co.*, 18 How., 421."

The cases cited by the plaintiff have to do with the building of bridges, or the establishing of harbor lines, the latter involving powers granted under §11 of the Act of March, 1899, which has no bearing on these cases.

Even if the contention of the plaintiff were correct that the necessary authority for the erection of the borings might have been obtained from the Secretary of War, it was never found below, as a matter of fact, that the Board of Water Supply had ever properly obtained this permission from the Secretary of War.

The case of *Gring* v. *Ives*, 222 U. S., 365, upon which the plaintiff places great emphasis, is not in point. In that case an action was brought by the owner of a marine railway against a tugboat, for running into and damaging it. It appeared that this railway projected several hundred feet into the stream, and had been in existence for 18 years. There was a clear channel of 540 feet, but the tug did not follow it, as a result of which the collision occurred.

Some time previous to the collision, the Secretary of War, by his authority of §11 of the Act

of March, 1899, had established a harbor line, which made the railway an unlawful projection beyond the newly established line. The tug tried to defend upon the ground that the railway was a nuisance, and the negligence of the tug, therefore, created no liability. But the Court *held* that since the railway had lawfully existed long before the new harbor line was established, it was not such an unlawful structure that the negligence of the tug could thereby be excused.

That case differs from the present cases in that the marine railway had originally been erected lawfully, and was in no sense a nuisance. The newly established harbor line did not as a matter of fact make it any more a nuisance, even though it made it thereafter unlawful, and the tug, therefore, had to exercise due care not to cause any damage to it.

But in these present cases, the borings were to be erected in the very middle of the channel of the river, and were obviously nuisances from the very first both in fact, and in law also, if it be shown that they were not properly authorized. Therefore, the defendant should not be held liable for negligence other than wilful negligence, as to the damages caused by these collisions.

The case of *Gring* v. *Ives, supra*, just discussed, throws no light on the Federal question here involved, as it raised a question of the powers of the Secretary of War under §11 of the Act, which is in no way connected with the cases was now before this Court.

The Federal question here involved has apparently never been definitely decided. It certainly cannot be said that it is so frivolous as to warrant that the writs of error be dismissed or the judgments be affirmed.

LAST POINT.

THE WRITS OF ERROR PRESENT A SUBSTANTIAL FEDERAL QUESTION, OVER WHICH THIS COURT HAS JURISDICTION; THE WRITS OF ERROR SHOULD NOT BE DISMISSED, NOR THE JUDGMENTS OF THE STATE COURTS AFFIRMED ON MOTION BUT SHOULD BE RESERVED UNTIL THE FINAL HEARING.

April, 1914.

J. Parker Kirlin,
Counsel for Plaintiff-in-Error.

CORNELL STEAMBOAT COMPANY *v.* PHŒNIX CONSTRUCTION COMPANY.

SAME *v.* SAME.

SAME *v.* SAME.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Nos. 933, 934, 935. Motion to dismiss or affirm submitted April 27, 1914.—Decided May 11, 1914.

While the fact of negligence may, if abstractly considered, be a state question concerning which this court would accept, and possibly might be bound by, the decision of the state court, when the negligence involves and concerns a subject of Federal jurisdiction which it is its duty to decide, this court must, to the extent necessary to enable it to discharge that duty, consider the subject independent of the action of the state court. *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601.

The fact that a vessel is anchored in a navigable river without the authority of the Secretary of War does not endow other vessels with a license to wrongfully injure it, nor does that fact relieve them from responsibility for colliding with the anchored vessel solely by their own negligence not contributed to in any way by it.

210 N. Y. 113, affirmed.

THE facts, which involve the jurisdiction of this court to review judgments of the state court, and also questions of negligence in colliding with vessels anchored in navigable waters, are stated in the opinion.

Mr. E. Crosby Kindleberger for defendant in error, in support of motion.

Mr. J. Parker Kirlin for plaintiff in error, in opposition to motion:

The Federal question involved must necessarily be the basis of the decisions in these cases. The Court of Appeals of the State of New York did actually decide these cases on the basis of the Federal question involved. 210 N. Y. 113, 118.

The judgment of the trial court that these cases could be decided solely on the ground of the defendant's negligence and the dictum in the opinion of the Court of Appeals to the same effect were erroneous and the Federal question raised by the defendant is necessarily involved in the decision. *Murdock* v. *City of Memphis*, 20 Wall. 590, 636.

One who erects a structure which is a public nuisance cannot recover damages for any injury to the structure in the absence of wilful fault. *Montgomery* v. *Portland*, 190 U. S. 89; *Cummings* v. *Chicago*, 188 U. S. 410; *Hart* v. *Mayor*, 9 Wend. 571; *Moore* v. *Commissioners*, 32 How. Pr. 184; *Blanchard* v. *W. U. Tel. Co.*, 60 N. Y. 510; *Moore* v. *Jackson*, 2 Abb. (N. C.) 211; *Gold* v. *Carter*, 9 Humph. 369; *Garey* v. *Ellis*, 1 Cush. 306; *Rathbun* v. *Payne*, 19 Wend. 399; *Foley* v. *McKeever*, 56 App. Div. (N. Y.) 517; *Haskell* v. *New Bedford* (1871), 108 Massachusetts, 208; *North Shore Boom Co.* v. *Nicomen Boom Co.*, 212 U. S. 406; *People* v. *Vanderbilt*, 26 N. Y. 287; 28 N. Y. 396; *People* v. *Horton*, 64 N. Y. 610; *Woodman* v. *Kilborn Mfg. Co.*, 30 Fed. Cas. No. 17978; *Hart* v. *Mayor*, 9 Wend. 571.

The Federal question involved is properly presented by the writs of error to this court.

The immunity claimed by the plaintiff in error under a proper construction of the act of March 3, 1889, presents a substantial Federal question to this court.

There can be no doubt that where a person claims a right under a Federal statute to carry on his business in a certain way and this right is denied him by any court, the question whether or not he has been deprived of his right or immunity is one which this court is authorized to pass

on. Rev. Stat., § 709; *Smalley* v. *Langenon*, 196 U. S. 93; *Belden* v. *Chase*, 150 U. S. 674; *Railroad Company* v. *Maryland*, 21 Wall. 456; *Missouri &c. Co.* v. *Haber*, 169 U. S. 613.

Where it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction, the case is one arising under the laws or Constitution of the United States. *Cooke* v. *Avery*, 147 U. S. 375; *Oil Company* v. *Miller*, 97 Fed. Rep. 690; *Northern Pacific Railway Co.* v. *Soderberg*, 188 U. S. 526; *Doolan* v. *Carr*, 125 U. S. 618.

The immunity claimed by the defendant is sustained by a proper construction of the statute.

The motion to affirm is premature and should not be granted before the cases have been reviewed upon the writs of error. *Steel* v. *Culver*, 211 U. S. 26; *Micas* v. *Williams*, 104 U. S. 556; *Jenkins* v. *Banning*, 23 How. 455; *Welmer* v. *Bauer*, 160 Fed. Rep. 240. *Philadelphia Company* v. *Stimson*, 223 U. S. 605, and *Gring* v. *Ives*, 222 U. S. 365, distinguished.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

The cases are before us on a motion to dismiss or affirm, and the facts essential to its consideration are these:

The Phœnix Construction Company, defendant in error, brought three actions to recover damages alleged to have resulted from the negligence of the Cornell Steamboat Company, plaintiff in error, in permitting its tugs and canal boats on three separate occasions in the year 1908 to collide with certain scows and other property of the Construction Company on the Hudson River. The cases were tried by a referee, resulting in judgments against the

Steamboat Company, which were affirmed by the Appellate Division of the Supreme Court (146 N. Y. App. Div. 951), and by the Court of Appeals (210 N. Y. 113). These writs of error were then prosecuted to the court below, to which the records were remitted by the Court of Appeals, upon the theory that Federal questions were involved and wrongly decided.

The Construction Company was a contractor for the Board of Water Supply of the City of New York, and in the year 1908 was engaged in making test borings in the bed of the Hudson River for the purpose of determining where it was best to tunnel under the river in the construction of the Catskill Aqueduct. At the times of the collisions complained of boring operations were carried on simultaneously at four points on a line across the river near Storm King Mountain, and it was with plants established at certain of these borings, consisting of pipes, drills, platforms, scows and other property that canal boats in tow of the Steamboat Company collided. The referee found in each case that the location of the borings was known to the masters of the tugs, who had many times passed between them with tows; that upon the nights of the accidents, lights which could be seen for more than a mile were displayed on the borings; that the collisions were the direct result of the negligence of the servants of the Steamboat Company in charge of its tugs, and that the Construction Company was in no wise negligent. In addition considering the defence made by the Steamboat Company that it was not liable because the structures of the Construction Company were unlawful obstructions in the channel, erected and maintained without a lawful permit from the Secretary of War, and without authority of Congress, as required by §§ 9 and 10 of the act of March 3, 1899 (c. 425, 30 Stat. 1121, 1151; U. S. Comp. Stat. 1901, p. 3541), the findings of the referee were in substance these: In 1906, upon the application of the

Board of Water Supply of New York City, a permit was issued by the Secretary of War authorizing borings to be made in the bed of the Hudson River at certain points near New Hamburg, and that subsequently such permit was modified by communications signed by members of the corps of engineers of the United States army located in New York City and having charge of the district in which the work was being executed, so as to permit the borings to be carried on at points near Storm King. Under these facts the referee stated that in his opinion it was extremely doubtful whether the Construction Company was lawfully authorized to establish its boring plants in the river, but held that even although the permits did not constitute lawful authority and the boring plants were unlawful obstructions in the river, the Steamboat Company was not because of that circumstance relieved of its duty to exercise ordinary care, and his decision in each case was based solely upon the fact that the collisions were caused by the exclusive negligence of the Steamboat Company. In affirming the judgments the Appellate Division filed no opinion, although it appears that two of the justices concurred "solely on the ground that authority was given by the Secretary of War to make the borings and anchor the barges in the river," from which it is to be inferred that a majority of the court were of opinion that the judgments were amply sustained by the reasoning of the referee. The Court of Appeals, however, while stating that as the actions were for common law negligence, the ground of negligence stated by the referee was adequate to sustain the judgments, also considered the contention based upon the statute and additionally placed the affirmance upon the conclusion that the facts found by the referee, which were concluded by the unanimous affirmance by the Appellate Division, were sufficient to establish authority given by the Secretary of War for the operations carried on by the Construction Company, and that the

contention of the Steamboat Company that action by Congress was essential to authorize the Construction Company to do the work was without foundation.

The assignments of error here insisted upon as involving a Federal question are directed to the conclusions of the Court of Appeals last stated.

Clearly the judgment of the Court of Appeals which is under review rests upon two propositions: (1) The sufficiency of the authority from a Federal point of view under which the Phœnix Construction Company was carrying on its work in the bed of the river, and in the execution of which work it had anchored in the river its barges and other appliances incidental to the boring operations in which it was engaged. (2) The absence of all negligence on the part of the Construction Company resulting from the place where its appliances were anchored in the stream, or from any other cause, and the happening of the accident solely because of negligence on the part of the Steamboat Company. It is elementary that where the judgment of a state court which is under review by this court rests upon two or more grounds one or more of which are Federal and others of which are not Federal because resting solely upon state grounds independent of Federal rights and which state grounds are therefore completely adequate to sustain the judgment under consideration, no jurisdiction obtains to review. This doctrine it is insisted is here applicable for the following reason: Because conceding that the first proposition, that is, the rightfulness of the acts of the company in placing its appliances in the stream involves Federal questions which are reviewable, the second proposition upon which the court based its decision, that is, the happening of the accident solely as the result of the negligent conduct of the Steamboat Company, is an independent state ground broad enough to sustain the judgment without the necessity of considering the Federal question involved in the first proposition.

But the mistake lies in the contention that the finding that there was no negligence on the part of the Construction Company and that the negligence of the Steamboat Company was the sole cause of the damage suffered involved purely questions of state cognizance involving no Federal considerations whatever. We say this is the error because the determination of the issue of negligence upon the hypothesis that there was no Federal authority given to place the obstructions in the river necessarily involves a consideration of the nature of the obstructions and the ascertainment of whether in and of themselves they so interfered with or impeded the right to navigate the river, that is, to carry on interstate commerce by using the river, as to cause the mere presence of the obstructions to constitute negligence *per se*, that is, to render the conclusion necessary that their mere presence was the efficient and proximate cause of the accident complained of. Because the elements involved in the decision of this Federal question are intermingled with the elements necessary to be considered to determine whether there was negligence irrespective of the Federal right affords no reason for not considering and disposing of the issue which the case presents from the Federal aspect, or to treat it as non-existing. It is indeed true that the fact of negligence in and of itself abstractly considered may be a state question concerning which we would accept, and indeed it may be conceded would be bound by the conclusion of the state court. But when negligence involves and concerns a subject of Federal jurisdiction which it is our duty to decide, to the extent necessary to enable us to discharge that duty, we must consider and review the subject independent of the action of the state court. *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 612.

The motion to dismiss being thus adversely disposed of, it remains to consider the motion to affirm, which we think should be granted because of the entire want of

foundation, that is in substance the frivolousness, of the proposition upon which the contention as to jurisdiction to review must rest, and we have reached this conclusion for the following reasons: (a) because under the circumstances disclosed by the record we are of the opinion that it is manifest that whether the ingredients of negligence be considered from the Federal point of view or from the point of view of the general law it clearly results that the injury which the Construction Company suffered was purely and exclusively, as held by all the courts below, the result of the negligence of the Steamboat Company unaffected in a legal sense by the act of the Construction Company in placing its works in the stream at the places and under the circumstances shown. (b) Because reaching this conclusion we are of the opinion that the question of the sufficiency or insufficiency of the Federal authority by which the appliances of the Construction Company were placed in the river becomes wholly negligible and need not be considered, because even assuming the want of authority, such absence of authority conferred upon the Steamboat Company no right to negligently injure the property of the Construction Company. In other words we are of the opinion that conceding that the appliances and boats of the Construction Company were in the river at the points stated without authority, that fact did not endow the Steamboat Company with a license to become a wrongdoer free from responsibility, and did not exempt it therefore from liability for the consequences of a wrong inflicted solely by its own negligence not contributed to in any way by the Construction Company.

Affirmed.